


A Treatise On the Law of Landlord and Tenant

With an Appendix Containing Forms of
Leases, Volume 1



ROBERT HUNTER, WILLIAM GUTHRIE





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A Treatise On the Law of Landlord and Tenant

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A TREATISE
ON THE
LAW
OF
LANDLORD AND TENANT,

WITH AN APPENDIX CONTAINING
FORMS OF LEASES.

BY ROBERT HUNTER, ADVOCATE.

IN TWO VOLUMES.

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PREFATORY NOTE TO THE FOURTH EDITION.

IN this Edition the book remains substantially as the Author left it, except so far as the law has been altered and developed since 1860 by legislation and decisions.

The pedantic multiplication of references to the old reports of decisions, all of which may be found in Morison's Dictionary, has been omitted ; and it is hoped that the labour of reference has been facilitated by the addition of marginal rubrics, by dividing the text into more frequent paragraphs, and by printing the notes in double columns.

The pages of the third edition, that of 1860, are printed in this edition in square brackets, thus [509]; and the additions made by the Editor are indicated in the same way.

PREFACE TO THE THIRD EDITION.

THE Second Edition of this Treatise was published in the year 1845. During the interval there has been a progressive advance of agricultural, manufacturing, and mineral wealth, and a consequent increase of the means of its dissemination. The important and judicious alterations on the commercial policy of the nation have contributed largely to the improvement and extension of agriculture and of manufactures. The fabrication of machinery for home consumption and for exportation, and the use of iron for timber in the construction of vessels, have given the metallic substances a more prominent place in commerce. The necessity of a greater production of those substances has led to the practical development of mineral strata in a ratio of increase unprecedented in the history of mining operations. In combination with this result, there has been a demand for fuel, necessarily augmenting in proportion to the augmentation of steam machinery. And the creation of greater facilities of transport by means of railways, in itself a material object of manufacture, has largely increased the demand for all commodities.

These causes have, in their turn, originated new adaptations of the Contract of Lease, by modifying the stipulations already recognised, and introducing others previously unknown. These have been less marked in agricultural leases than in leases of other character. Notwithstanding the improvements which the abolition of monopoly, the increase of agricultural capital, the skilful application of science in agricultural operations, and the better education and posi-

tion of the tenant-farmers, there has been little advance of liberality in the stipulations of the lease. In important districts there have been examples even of retrogression, by the imposition of additional restraints on the freedom of cultivation. The alterations, progressively beneficial, on the mineral lease, have become numerous and effective, more especially during the last few years. But the nature of the mineral subject itself, the complicated and varied means which must be adopted for remunerative production, and the necessity of the frequent interposition of men of skill, have hitherto prevented, and probably ever will prevent, the formation of a system of stipulations and of management. On the leases of urban subjects, as warehouses and shops, there have been material improvements; but the lease of those subjects which may be styled purely manufacturing has become of less consequence by reason of unfrequent occurrence, as the manufacturers are themselves ordinarily the proprietors. A new subject of lease has been introduced by the formation of railways, which, although it can never be extensive, must, from its peculiarity, always require much consideration.

A variety of the contract arising out of the love of field sports is assuming a marked position. Large tracts of country once occupied as sheep walks have been converted into deer forests. The rent paid for the heath fowl often exceeds that derived from the sheep, which has led to some material changes on the pastoral lease. Whether this system be or be not consistent with sound political economy and true civilisation, while it continues, the relative variety of the Contract of Lease will demand and undergo progressive improvement, both in its general tenor and in its special stipulations.

While the Contract of Lease has been subjected to those alterations, extensive and important changes have been made upon the law. These are not very observable in the decisions of the Courts; for although there may have been no material difference in the comparative number of ad-

judged cases, few rules of law have been established, and little doctrine has been elicited. The Courts, moved by considerations deemed to be equitable, have often been governed in their judgments not so much by principle, analogy, or precedent, as by matter purely special.

But alterations of a grave character have been made on the law by statute. During the last fifteen years there have been more statutory changes on the law of Scotland than there had been during the preceding half century. Almost every department of the law has been subjected to abrogation and amendment; and the law of Lease has been effected not only by those changes which have been made on it directly, but also by those which have been made in other departments. The direct changes are few, but the indirect are numerous. In statutes, apparently alien to the subject, there are enactments which operate either by the abrogation of old law or by the creation of new. A few of the statutes have been explained by decisions, but the great body of them still remains to be subjected to the test of forensic and judicial examination.

In this edition, as in the former editions, the Author has endeavoured to develope the doctrine recorded in the books and decisions, and to make opinion strictly subordinate; but it may be that, as his own views have become more matured he has stated them more frequently, although at variance with those of the Bench. He has, however, seldom indicated opinions purely speculative, by attempting to solve by anticipation questions which have not actually emerged.

One of the Author's objects in former editions was to make his Treatise subservient, not merely to a practical detail of the law of Lease, but to the development of its history. Independently of the Introductory Dissertation, historic notices were occasionally combined with the enunciation of the rules of law or the explanations of practice. The substance of statutes abrogated by desuetude or by repeal was briefly narrated; and decisions, although super-

seded as precedents, were retained. In the present edition the same course has been followed. No inconsiderable portion of the older law has ceased to be operative, more especially by statutory change; but the statutes which were in observance, and the decisions which formed precedents, have been in so far retained as to indicate what the law was when compared with what it is.

The Author has derived much benefit from the communications and remarks of friends on whose knowledge and judgment he has much reliance, and he begs their acceptance of his cordial thanks. To one of his friends and brethren of the Bar he feels especially grateful: in Mr ROBERT ORR the Author had an able and assiduous coadjutor, who not only effectively revised the press sheets, but detected errors, supplied omissions, and contributed important and valuable suggestions.

EDINBURGH, *December 1, 1860.*

CONTENTS

OF

VOLUME FIRST.

| | PAGE |
|---|------|
| INDEX OF CASES CITED, | XXIV |
| HISTORICAL INTRODUCTION. | |
| CHAPTER I. OBJECT OF THE INTRODUCTION, | 1 |
| II. HEBREW LEASE, | 2 |
| III. GREEK LEASE, | 22 |
| IV. ROMAN LEASE, | 28 |
| V. CONTINENTAL LEASE DURING THE MIDDLE AGES, | 32 |
| VI. ANCIENT ENGLISH LEASE, | 39 |
| VII. ANCIENT SCOTTISH LEASE, | 48 |
| VIII. ANCIENT SCOTTISH LEASE CONTINUED, | 62 |
| IX. CROWN LEASES, | 66 |
| X. ECCLESIASTICAL LEASES, | 69 |
| PRELIMINARY CHAPTER, | 79 |
| Art. 1. Definition of Lease, | 79 |
| 2. General Exposition of the Tenor of the Treatise, | 79 |

BOOK I.

LESSOR AND LESSEE, OR BY AND TO WHOM A LEASE
CAN BE GRANTED.

| | PAGE |
|---|------|
| CHAPTER I. INDIVIDUAL PROPRIETOR IN FEE-SIMPLE, | 81 |
| Section I. MAJOR, | 81 |
| Art. 1. Natural Incapacity, | 81 |
| 1. Blindness, | 81 |
| 2. Deafness and Dumbness, | 81 |
| 3. Insanity and Fatuity, | 83 |
| 4. Interdiction, | 84 |
| Art. 2. Legal Incapacity, | 84 |
| Forfeiture, | 84 |
| II. MINOR, | 85 |
| Art. 1. Without Curators, | 85 |
| 2. With Curators, but without their Consent, | 86 |
| III. COMPLETED OR INCOMPLETED TITLE, | 87 |
| Art. 1. Infeft or not, or Title Reduced, | 87 |
| 2. Apparent Heir, | 88 |
| CHAPTER II. INDIVIDUAL PROPRIETOR, | 89 |
| Section I. LIMITATION BY ENTAIL, | 89 |
| Art. 1. General Import of Entails, | 89 |
| 2. Entails permitting or not permitting Long Leases, | 89 |
| 3. Leases under the Statute 10 Geo. III. c. 61, | 90 |
| 4. Powers limited to granting Leases compatible with good administration, | 93 |
| 5. Leases under the Statutes 6 and 7 Will. IV. c. 42; 1 and 2 Vict. c. 70; 11 and 12 Vict. c. 36; and 16 and 17 Vict. c. 94, | 95 |
| 6. Leases under the 3 and 4 Vict. c. 48; 4 and 5 Vict. c. 38; 7 and 8 Vict. c. 37; and 12 and 13 Vict. c. 49, and Local Statutes, | 99 |
| 7. Leases injurious to the Heirs in Succession reducible if Entail be recorded, | 102 |
| 8. Rule for construing Prohibitions, | 103 |

CONTENTS.

xi

| | PAGE |
|---|------|
| Art. 9. Phraseology barring Long Leases or Grassums, | 103 |
| 1. Alienate, | 104 |
| 2. Dispose, | 105 |
| 3. Put away, | 106 |
| 4. Without Diminution of the Rental, | 106 |
| 10. Practical Effect of the Prohibitory Phraseology, | 107 |
| 11. Power to Lease Minerals and Woods, | 119 |
| 12. Limitation of Power to Lease the Mansion-house . and its Appurtenances, | 123 |
| Section II. LIMITATION BY FEE AND LIFE-RENT, | 124 |
| Art. 1. Powers of Fiar thus limited, | 124 |
| 2. Powers of Life-renter, | 125 |
| III. LIMITATION BY CONJUNCT PROPERTY, | 129 |
| IV. LIMITATION BY PRIVATE TRUST, | 130 |
| V. THE VASSAL'S RIGHT OF LEASING : IS IT LIMITED BY A CLAUSE OF PRE-EMPTION IN HIS FEU-CHARTER ? | 131 |
| CHAPTER III. PUBLIC ADMINISTRATORS, | 132 |
| Section I. THE CROWN, | 132 |
| II. THE CHURCH, | 135 |
| Art. 1. Mansees and Glebes, | 135 |
| 2. Lands Mortified to Parochial Ministers, | 127 |
| III. UNIVERSITIES, | 137 |
| Art. 1. General Rules applicable to aggregate Cor- porations, | 137 |
| 2. Administrators of University Property, | 138 |
| 3. Powers of Administrators, | 141 |
| IV. MORTIFICATIONS, | 143 |
| V. CIVIC CORPORATIONS, | 146 |
| Art. 1. Administrations of Royal Burghs, | 146 |
| 2. Warrant of Leases, | 148 |
| 3. Mode of Letting, | 150 |
| 4. Duration and other Stipulations, | 151 |
| 5. Powers of, and Mode of, Letting by Parlia- mentary Burghs, | 153 |
| 6. Powers of, and Mode of, Letting by Burghs of Regality and Barony, | 155 |
| 7. Subordinate, Civic, and other Corporations, | 157 |

| | PAGE |
|---|------|
| Section VI. PUBLIC TRUSTS, | 157 |
| Art. 1. Friendly, Industrial, and Building Societies, . | 158 |
| 2. Road Trustees, | 159 |
| 3. Religious Communities, | 159 |
| VII. ADMINISTRATORS PARTLY PUBLIC AND PARTLY PRIVATE. | |
| ASSOCIATIONS UNDER DWELLING-HOUSES ACT, . | 161 |
| CHAPTER IV. PRIVATE ADMINISTRATORS, | 163 |
| Section I. HUSBAND AS ADMINISTRATOR OF HIS WIFE'S PROPERTY, . | 163 |
| II. ORDINARY POWERS OF TUTORS, CURATORS, AND JUDICIAL | |
| FACTORS, | 166 |
| Art. 1. Tutors, | 166 |
| 2. Curators, | 168 |
| 3. Judicial Factors, | 171 |
| III. PUPILS PROTECTION ACT, 12 AND 13 VICT. c. 51, . | 172 |
| IV. EXTRAORDINARY POWERS GRANTED BY THE COURT OF | |
| SESSION, | 175 |
| Art. 1. Authority to do ordinary acts of Administra- | |
| tion will be refused, | 175 |
| 2. Authority applied for to do necessary, but not | |
| ordinary, acts will be granted, | 176 |
| 3. Form of Application, | 185 |
| 4. Judicial Authority does not protect from Re- | |
| duction, | 187 |
| V. PRIVATE COMMISSIONERS OR FACTORS, | 187 |
| CHAPTER V. TENANT CONSIDERED AS A LESSOR, | 189 |
| VI. LESSEE, | 190 |
| Section I. MAJOR, | 190 |
| Art. 1. Natural Incapacity, | 190 |
| 1. Blindness and Deafness and Dumbness, . | 190 |
| 2. Insanity or Fatuity, | 190 |
| 3. Legal Incapacity, | 192 |
| Forfeiture of Lessee, | 192 |
| II. THE CROWN, | 195 |
| Art. 1. The Crown as a Statutory Lessee, | 195 |
| 2. Donatory of the Crown, | 195 |
| III. PAFIST, | 196 |

CONTENTS.

xii

| | PAGE |
|--|------|
| Section IV. ACT DISCHARGING BUTCHERS FROM BEING GRAZIERES, . . . | 197 |
| V. ALIEN, | 198 |
| Art. 1. Doctrine of the Common Law, | 198 |
| 2. Statutory Right of Aliens to be Lessees, | 203 |
| 3. Denizen, | 204 |
| VI. FEMALE LESSEE, | 204 |
| VII. MINORS, TUTORS AND CURATORS, | 208 |
| VIII. JOINT LESSEES, | 210 |
| Art. 1. Joint Lease in name of Individuals, | 210 |
| 2. Lease to a Copartnery, | 215 |
| 3. Lease to Corporations or other Public Admini- strators, | 217 |
| 4. Tack under the 18 and 19 Vict. c. 88, | 217 |
| CHAPTER VII. HEIR OF LESSEE, | 218 |
| Section I. SUCCESSION AB INTSTATO, | 218 |
| Art. 1. Heir Single and Major, | 218 |
| 2. Heirs Portioners, | 220 |
| 3. Lease devolving to Minor Heir, | 221 |
| 4. Right of Donatary of the Crown under a Gift of <i>Ultimus Heres</i> or Bastardy, | 222 |
| II. SUCCESSION BY DESTINATION OR SETTLEMENT, | 223 |
| Art. 1. Destination embodied in the Lease, | 223 |
| 2. Destination by Deed of Lessee, or his Trustee, | 224 |
| 1. By Lessee himself, | 224 |
| 2. By Trustee of Lessee, | 230 |
| 3. Destination by Entail, | 230 |
| 4. Heir succeeds to a Lease without Service, | 233 |
| 5. The <i>Jus deliberandi</i> applies to Leases, | 234 |
| III. TERCE AND COURTESY, | 235 |
| CHAPTER VIII. ASSIGNEE AND SUBLESSEE, | 235 |
| Section I. DEFINITION OF ASSIGNATION AND SUBLEASE, | 235 |
| II. DIFFERENCE OF THE ENGLISH AND SCOTCH LAW, AND GENERAL RULE OF THE LATTER, | 236 |
| III. APPLICATION OF THE RULE, | 237 |
| Art. 1. Lease expressly to Assignees and Sublessees, | 237 |
| 2. Power to Output and Input Tenants, | 237 |

| | PAGE |
|---|------|
| Art. 3. Power of Subletting not to be presumed, . . . | 238 |
| 4. Power of Subletting now gives power to Sublet the whole subject, . . . | 238 |
| 5. Power to Sublet does not give power to Assign, and <i>vice versa</i> , . . . | 238 |
| IV. APPLICATION OF THE RULE UNDER IMPLIED POWER, . . | 239 |
| Art. 1. Agricultural Lease of Extraordinary Duration, . . | 239 |
| 2. Leases for Life or during Tenure of Office, . . | 241 |
| V. URBAN TENEMENT, | 241 |
| Art. 1. What is to be deemed an Urban Tenement, . . | 241 |
| 2. Power to Assign or Sublet held to be implied unless expressly excluded, . . . | 242 |
| 3. Limitations on the power of Assigning or Subletting, | 243 |
| 4. Where an Urban Tenement is let for a single year, is the power of Assigning or Subletting implied? | 246 |
| 5. Can a House let furnished be Assigned or Sublet? . . | 247 |
| VI. WHAT RULE APPLIES TO LEASES OF MINES AND FISHERIES, . | 247 |
| VII. CASES IN WHICH EXPRESS EXCLUSION IS INOPERATIVE, . | 248 |
| Art. 1. Heir-at-Law, | 248 |
| 2. Donatary of the Crown, | 248 |
| VIII. SPECIAL MODES OF OPERATION OF EXPRESS EXCLUSION, . | 249 |
| Art. 1. Exclusion of Assignees does not exclude Sublessees, or <i>vice versa</i> , | 249 |
| 2. Power to Exclude personal to Landlord, | 250 |
| 3. Construction of Exclusion unless Lessor consent, . . | 250 |
| IX. EXCLUSION NOT TO BE EVADED BY A DEED IN THE FORM OF A TRUST-SETTLEMENT, OR BY A DELUSIVE DEVICE, . . | 254 |

BOOK II.

SUBJECT-MATTER OF LEASE.

| | PAGE |
|---|------|
| CHAPTER I. GENERAL DESCRIPTION OF SUBJECT-MATTER, . | 256 |
| II. LAND, | 257 |
| III. MILLS, | 258 |
| Section I. GENERAL DESCRIPTION OF MILLS AS LEASEHOLD SUB- JECTS, | 258 |
| II. GRAIN INCLUDED UNDER, OR EXEMPTED FROM, THIRLAGE, . | 259 |
| Art. 1. <i>Grana Crescentia</i> , | 259 |
| 2. <i>Grana Mobilis</i> , or Grindable Corn, | 260 |
| 3. <i>Insecta et Nata</i> , | 261 |
| 4. General Constitution of Thirlage, | 262 |
| III. MILL SERVICES AND SEQUELS, | 263 |
| IV. USAGE, | 264 |
| V. DEDUCTIONS, | 265 |
| VI. COMMUTATION, | 265 |
| VII. SUSPENSION, | 266 |
| VIII. EXEMPTIONS, | 267 |
| IX. KILN, | 269 |
| CHAPTER IV. MINERALS, | 269 |
| Section I. GENERAL ENUMERATION OF MINERALS ORDINARILY LEASED, | 269 |
| II. WATER, FUEL, AND OTHER NATURAL ACCOMMODATIONS, . | 270 |
| III. MACHINERY, ROADS, AND OTHER ARTIFICIAL ACCOMMO- DATIONS, | 270 |
| IV. RIGHT TO EXEMPTIONS AND IMMUNITIES, | 271 |
| V. RIGHT TO SERVICES OF WORKMEN, | 271 |

| | PAGE |
|--|------|
| CHAPTER V. SALT WORKS, | 272 |
| Section I. MACHINERY AND OTHER ACCOMMODATIONS, | 272 |
| II. RIGHT TO SERVICES OF SALTERS, | 272 |
| CHAPTER VI. WOODS, | 273 |
| Section I. CAN WOODS BE LEASED? | 273 |
| II. SUBJECT-MATTER OF A LEASE OF WOODS, | 276 |
| CHAPTER VII. WATER, | 275 |
| VIII. FISHERIES, | 278 |
| Section I. RIGHTS AND ACCOMMODATIONS LET, | 279 |
| II. CLOSE TIME, OR LIMITATION OF THE FISHING SEASON, . | 279 |
| III. LAWFUL AND UNLAWFUL TACKLE AND UTENSILS, . . | 280 |
| IV. PRIVILEGES AND CONVENIENCES, | 283 |
| CHAPTER IX. KELP, | 284 |
| X. DWELLING-HOUSES, SHOPS, AND MANUFAC- TORIES, | 284 |
| Section I. HOUSES AND SHOPS, | 284 |
| II. MANUFACTORIES, | 285 |
| Art. 1. Manufactory without Apparatus, | 285 |
| 2. Manufactory with Apparatus, | 285 |
| 3. Manufactory let with a supply of Steam Power, . | 285 |
| 4. Subject-matter including the Stipulations, . . | 288 |
| 5. Obligations on the Lessor, | 289 |
| 6. Obligations on the Lessee, | 290 |
| 7. Clauses applicable to both Parties, | 291 |
| 8. Explication of Clauses, | 292 |
| CHAPTER XI. STEAM-POWER WITHOUT BUILDING ATTACHED, . | 293 |
| XII. FIXTURES, | 294 |
| Section I. PRINCIPLE OF DOCTRINE OF FIXTURES, | 294 |
| II. ROMAN AND FOREIGN LAW, | 297 |

CONTENTS.

xvii

| | PAGE |
|--|------|
| Section III. LAW OF ENGLAND, | 299 |
| Art. 1. General Rule, | 299 |
| 2. Agricultural Subjects, | 299 |
| 3. Horticultural Subjects, | 302 |
| 4. Commercial Subjects, including Manufacturing and Mineral, | 305 |
| 5. Urban Subjects, | 308 |
| IV LAW OF SCOTLAND, | 309 |
| Art. 1. General Rule, | 309 |
| 2. Agricultural Subjects, | 312 |
| 3. Horticultural Subjects, | 315 |
| 4. Commercial Subjects, including Manufacturing and Mineral, | 316 |
| 5. Urban Subjects, | 322 |
| V. EFFECT OF SPECIAL STIPULATIONS ON THE LESSEE'S RIGHT TO REMOVE FIXTURES, | 323 |
| VI. OF THE TIME WITHIN WHICH THE LESSEE MAY RE- MOVE FIXTURES, | 324 |
| CHAPTER XIII. STEELBOW GOODS, | 325 |
| Section I. ORIGIN AND LEGAL NATURE OF STEELBOW GOODS, | 325 |
| II. ORDINARY SUBJECT-MATTER OF STEELBOW GOODS, | 329 |
| CHAPTER XIV. GAME, | 331 |
| Section I. PRINCIPLE AND TENOR OF LEASE OF GAME, | 332 |
| Art. 1. Principle of Lease, | 332 |
| 2. Tenor of Lease, | 335 |
| 1. Lease of a Deer Forest, | 335 |
| 2. Ordinary Lease of Game, | 336 |
| 3. Is there an Implied Power to Assign or Sublet? | 336 |
| II. EXCLUSION OF POWER OF LEASING GAME, | 337 |
| CHAPTER XV. TOLLS, FERRIES, AND CUSTOMS, | 338 |
| Section I. TOLLS, | 338 |
| II. FERRIES, | 340 |
| III CUSTOMS, | 342 |
| IV. RENTS, FEU-DUTIES, CASUALTIES, DUES OF OFFICE, &c., | 344 |

| | PAGE |
|--|------|
| CHAPTER XVI. LEASES OF WHICH EXCLUSIVE PRIVILEGE FORMS THE ESSENCE, | 344 |
| Section I. CHURCH SEATS, | 345 |
| II. PLACES OF PUBLIC AMUSEMENT, | 347 |
| III. PRIVILEGE OF SELLING COMMODITIES, | 348 |
| XVII. RAILWAYS, | 348 |
| XVIII. BOWING CONTRACT, | 358 |

BOOK III.

CONSTITUTION OF THE CONTRACT OF LEASE,

| | |
|--|-----|
| CHAPTER I. GENERAL DOCTRINE OF CONSTITUTION, | 360 |
| II. CONSTITUTION OF LEASE AS A PERSONAL RIGHT, | 362 |
| III. VERBAL LEASE, | 363 |
| Section I. CONSTITUTION OF VERBAL LEASE, | 363 |
| II. DURATION OF VERBAL LEASE, | 364 |
| III. MODE OF PROVING VERBAL LEASE, | 366 |
| IV. OPERATION OF REI INTERVENTUS UPON VERBAL LEASE, | 369 |
| IV. WRITTEN LEASE, | 371 |
| Section I. EVIDENCE OF CONSTITUTION AND TENOR, | 371 |
| Art. 1. Written Evidence necessary, | 371 |
| 2. Effect upon the Granter and his Representatives, | 372 |
| 3. Purport of Writing, | 373 |
| 4. Construction of Writing, | 374 |
| 5. Oath, | 377 |
| 6. Admissibility of Parole Evidence in the Constitution, or for the Control or Expiscation of a Lease, | 377 |

CONTENTS.

xix

| | PAGE |
|--|------|
| Section II. FORMAL WRITTEN LEASE, | 381 |
| Art. 1. Clause of Description of Parties, | 382 |
| 2. ... of Destination, | 382 |
| 3. ... of Possession, | 383 |
| 4. ... of Duration, | 384 |
| 5. ... of Reservation, | 385 |
| 6. ... of Meliorations by Lessor, | 385 |
| 7. ... of Warrantice, | 386 |
| 8. ... of Rent, | 386 |
| 9. ... of Meliorations by Lessee, | 388 |
| 10. ... of Preservation, | 388 |
| 11. ... of Insurance, | 389 |
| 12. ... of Thirlage, | 389 |
| 13. ... of Management, | 389 |
| 14. ... of Bankruptcy, | 391 |
| 15. ... of Removal, | 392 |
| 16. ... of Reference, | 392 |
| 17. ... of Mutual Performance, | 393 |
| 18. ... of Registration, | 393 |
| 19. Testing Clause, | 393 |
| III. VARIATIONS IN CLAUSES, | 393 |
| Art. 1. Dairy and Pastoral Farms, | 393 |
| 2. Mills, | 394 |
| 3. Minerals, | 395 |
| 4. Fisheries, | 398 |
| 5. Manufactories, | 398 |
| 6. Steam-Power, | 399 |
| 7. Ferries, | 399 |
| IV. TESTING CLAUSE, | 399 |
| Art. 1. Solemnities of Execution, | 399 |
| 2. Tenor of the Testing Clause, | 401 |
| V. STAMP LAWS APPLICABLE TO THE CONTRACT OF LEASE, | 403 |
| Art. 1. Statutes, | 403 |
| 2. Execution of the Statutes in Scotland, | 407 |
| 3. Execution of the Statutes in England, | 413 |
| VI. ARTICLES OF LEASE, | 415 |
| Art. 1. General Nature and Object, | 415 |
| 2. Purport, | 415 |
| 3. Modes of Executing, | 416 |
| 4. Tenor of Relative Leases, | 418 |
| 5. Validity of Articles of Lease, | 418 |

| | PAGE |
|--|------|
| Section VII. WRITTEN OBLIGATION TO GRANT A LEASE AND WRITTEN ACCEPTANCE, | 420 |
| Art. 1. Missive Letters, or Obligation and Acceptance, | 421 |
| 2. Minute of Lease, | 421 |
| 3. Articles of Roup, | 422 |
| VIII. RENTAL RIGHTS, OR RENTALS, | 423 |
| Art. 1. General Description, | 423 |
| 2. Form of Rental Rights, | 424 |
| 3. Crown Rentallors, | 426 |
| IX. INVALIDITY OF A WRITTEN LEASE, DEFECTIVE OR INCOMPLETE, AND NOT FOLLOWED BY POSSESSION, | 427 |
| Art. 1. General Nature of Such Defectiveness or Incompleteness, | 427 |
| 2. Defectiveness from Improbateness, | 427 |
| 3. Incompleteness from Absence of Signature of Party, | 428 |
| 4. Incompleteness from Conditional Tenor of Obligation, | 429 |
| X. EFFECT OF POSSESSION OR REI INTERVENTUS UPON A LEASE DEFECTIVE OR INCOMPLETE, | 429 |
| Art. 1. General Doctrine of Possession, or Rei Interventus, | 429 |
| 2. Possession cures Informality or Defectiveness, | 430 |
| 3. Cases where Possession does not cure Informality or Defectiveness, | 438 |
| 4. Effect of Rei Interventus, | 440 |
| XI. PROCOGATION AND RENEWAL OF LEASE, | 442 |
| CHAPTER V. LEASE AS A REAL RIGHT, | 444 |
| Section I. STATUTE CREATES LEASE INTO A REAL RIGHT, | 444 |
| II. WHO ARE OR ARE NOT ACCOUNTED SINGULAR SUCCESSORS, AGAINST WHOM THE STATUTE GIVES PROTECTION, | 445 |
| Art. 1. Against whom the Statute protects the Lessee, | 445 |
| 2. Against whom the Statute does not protect the Lessee, | 446 |
| CHAPTER VI. WRITING, | 448 |
| VII. SUBJECT-MATTER OF LEASES WHICH ARE OR ARE NOT PROTECTED BY THE STATUTE, | 451 |
| Section I. SUBJECTS PROTECTED BY THE STATUTE, | 451 |
| II. SUBJECTS NOT PROTECTED BY THE STATUTE, | 452 |

CONTENTS.

xxi

| | PAGE |
|--|------|
| CHAPTER VIII. POSSESSION, | 456 |
| Section I. NATURE OF POSSESSION UNDER THE STATUTE, | 456 |
| II. LEGAL NECESSITY OF POSSESSION, | 457 |
| III. EFFECT OF POSSESSION OR OF WANT OF POSSESSION, | 458 |
| CHAPTER IX. DURATION, | 460 |
| Section I. POLICY OF GRANTING LEASES OF DEFINITE AND CONSIDER- ABLE DURATION, | 460 |
| II. LEASE TO BE VALID AGAINST SINGULAR SUCCESSORS MUST BE OF DEFINITE DURATION, | 461 |
| III. PERPETUAL LEASE INVALID AGAINST A SINGULAR SUC- CESSOR, | 462 |
| IV. LEASE TO ENDURE INDEFINITELY UNTIL PAYMENT OF A DEBT, OR IN SECURITY OF INTEREST DUE BY THE LESSOR TO THE LESSEE, | 463 |
| V. A LEASE, OF WHATEVER FIXED DURATION, IS VALID WHERE THE LESSOR'S POWERS ARE UNLIMITED, | 466 |
| VI. DURATION WHERE THE LESSOR'S POWERS ARE LIMITED, | 470 |
| VII. LEASE FOR SUCCESSIVE LIVES AND SEPARATE PERIODS AFTERWARDS,—DURING PLEASURE,—WITH ALTERNA- TIVE DURATION,—BEARING REFERENCE TO PREVIOUS LEASE,—AND WITHOUT AN ISH, | 470 |
| Art. 1. Lease for Successive Lives and separate Periods afterwards, | 470 |
| 2. Lease during Pleasure Terminates with the Life of the Lessor or Lessee, | 472 |
| 3. Lease with Alternative Duration, | 472 |
| 4. Lease bearing Reference to a previous Lease, | 472 |
| 5. Lease without an Ish, | 473 |
| CHAPTER X. RENT, | 473 |
| Section I. RENT AS A STATUTORY REQUISITE, | 474 |
| II. RENT MUST NOT BE ELUSORY, | 475 |

| | |
|---|-------------|
| Section III. OF WHAT RENT MAY CONSIST, | PAGE 477 |
| Art. 1. Money or Portion of Produce, | 477 |
| 2. Services, | 478 |
| IV. STIPULATED RETENTION OF RENT, | 479 |
| V. RESTRICTIONS ON POWER OF LESSOR TO FIX RENT OR TAKE GRASSUM, | 483 |
| CHAPTER XI. RENTAL RIGHTS WITH RELATION TO SINGULAR SUCCESSORS, | 483 |
| Section I. WRITING, | 483 |
| II. POSSESSION, | 484 |
| III. DURATION, | 484 |
| Art. 1. Duration where no Ish is expressed, nor Heirs are mentioned, | 484 |
| 2. Rental granted to the Rentaller and his Heirs, | 486 |
| 3. Perpetual Rental, | 487 |
| IV. RENT, | 487 |
| CHAPTER XII. PROROGATION AND RENEWAL OF A LEASE IN QUESTIONS WITH SINGULAR SUCCESSORS, | 488 |
| Section I. WHERE POSSESSION ON NEW LEASE IS MADE TO COMMENCE AT ITS DATE, | 489 |
| II. WHERE THERE IS A PROROGATION OR RENEWAL TO COM- MENCE AT A SUBSEQUENT DATE, | 489 |
| CHAPTER XIII. ASSIGNATION OF LEASE, | 493 |
| Section I. DEFINITION AND NATURE OF ASSIGNATION, | 493 |
| II. TENOR AND FORM OF AN ASSIGNATION, | 493 |
| III. INTIMATION, | 494 |
| Art. 1. Formal Intimation, | 494 |
| 2. Equipollents, | 495 |

| CONTENTS. | | xxiii |
|---|-------|-------|
| | | PAGE |
| Section IV. TRANSLATION AND RETROCESSION, | . . . | 496 |
| V. POSSESSION, NATURAL AND CIVIL, | . . . | 496 |
| VI. ASSIGNATION MAY BE ABSOLUTE OR QUALIFIED, | . . . | 497 |
| Art. 1. Absolute Assignment, | . . . | 497 |
| 2. Qualified Assignment, | . . . | 498 |
| VII. DOCTRINE OF THE TEXT WRITERS, AND PURPOSE OF THE DECISIONS RELATIVE TO AN ASSIGNATION RETENTA POSSESSIONE, | . . . | 499 |
| Art. 1. Doctrine of the Text Writers, | . . . | 500 |
| 2. Doctrine of the Decisions, | . . . | 501 |
| VIII. PROPOSED ALTERATION OF THE LAW, INCLUDING A REGISTER FOR LEASES AND ASSIGNATIONS, | . . . | 509 |
| IX. "AN ACT TO PROVIDE FOR THE REGISTRATION OF LONG LEASES IN SCOTLAND, AND ASSIGNATIONS THEREOF," | . . . | 510 |
| Art. 1. Leases admissible and Registers competent, | . . . | 511 |
| 2. Assignations and Translations, | . . . | 511 |
| 3. Title of Heir, Creditor, or Trustee, | . . . | 512 |
| 4. Preferences, | . . . | 513 |
| 5. Renunciations and other Denudations, | . . . | 513 |
| 6. Mode of Registering, | . . . | 513 |
| 7. Legal Effects of the Registration and other Procedure, | . . . | 514 |
| 8. Importation of the 10 and 11 Vict. c. 50, | . . . | 515 |
| X. DECISIONS RELATIVE TO TRANSLATION AND RETROCESSION, | . . . | 516 |
| CHAPTER XIV. SUBLEASE, | . . . | 517 |
| Section I. CONSTITUTION, FORM, AND SOLEMNITIES OF SUBLEASE, | . . . | 517 |
| Art. 1. Constitution of the Sublease, | . . . | 517 |
| 2. Form of the Sublease, | . . . | 519 |
| 3. Solemnities, | . . . | 520 |
| 4. Mode of Completion of Sublease, | . . . | 520 |
| II. DURATION OF SUBLEASE, | . . . | 521 |
| III. ASSIGNATION AND RENUNCIATION OF SUBLEASE, | . . . | 521 |
| CHAPTER XV. TACIT RELOCATION, | . . . | 523 |
| Section I. NATURE OF TACIT RELOCATION, | . . . | 523 |

| | PAGE |
|--|------|
| Section II. DOCTRINE OF THE LAW OF SCOTLAND, | 524 |
| Art. 1. Possession requisite, | 524 |
| 2. Warning or Renunciation, by whom, and within what time it must be given, | 525 |
| 3. Effect of not following out Warning or Re- nunciation, | 526 |
| 4. Tacit Relocation created by Receipt of Rent, or by similar matter, and <i>vice versa</i> , | 526 |
| III. KINDS OF LEASES AND SUBJECTS TO WHICH TACIT RELO- CATION APPLIES, | 529 |
| Art. 1. Kinds of Leases, | 529 |
| 2. Subjects, | 529 |
| IV. AGAINST WHOM TACIT RELOCATION OPERATES, | 529 |
| V. IS POSSESSION BY TOLERANCE OR BY A VIRTUAL LEASE RECOGNISED AS VALID? | 531 |

INDEX OF CASES CITED.

| <i>Pursuers.</i> | | <i>Defenders.</i> | |
|--|--|------------------------------------|--------------------------------------|
| | | | |
| A | | Fernie | ii, 198 |
| | | B | i, 478 |
| | | | i, 71, 129, 218, 262, 365, 370, 413, |
| | | | 478, 485, 527; ii, 13, 38, 44, |
| | | | 48, 303, 332, 350, 351, 354, |
| | | | 377, 393, 441, 576, 610. |
| A B, petitioner | | | i, 180, 181 |
| A | | Cunningham | ii, 440 |
| A | | Dunbar | ii, 53 |
| A | | Duncan | ii, 610 |
| A | | Gladston's Brother | ii, 611 |
| A | | Huntly, Marquis of | i, 167, 168 |
| A | | Simpson | ii, 449 |
| Abercorn, Earl of | | Wallace | ii, 516 |
| Abercorn, Marquis of | | Grieve | ii, 598 |
| Abercorn, Marquis of | | Paissley, Town of | i, 260, 262 |
| Abercromby | | Findlay | ii, 128 |
| Aberdeen, Bishop of | | Aberdeen, Executors of the late | |
| | | Bishop of | i, 71 |
| Aberdeen, Bishop of | | Forbes | i, 70 |
| Aberdeen, Bishop of | | Lindsay | i, 70 |
| Aberdeen, College of | | Fraser, Lord | i, 74 |
| Aberdeen, College of | | Mennies | i, 74 |
| Aberdeen, College of | | Muchal | i, 74 |
| Aberdeen, Earl of | | Northesk, Earl of | ii, 142 |
| Aberdeen, Earl of | | Farguhar | i, 111 |
| Aberdeen, Old College of | | Aberdeen, Town of | i, 138, 141 |
| Aberdeen, Treasurer of | | Gordon and others | ii, 292 |
| Aberdour, Heritors of | | Roddick | i, 136 |
| Aboyne, Earl of | | Grant | ii, 588 |
| Aboyne, Earl of | | Innes | i, 337 |
| Aboyne, Earl of | | Ogg | i, 431 |
| Aboyne, Earl of | | Vassals | i, 527 |
| Accountant of Court | | Morrison | i, 173 |
| Accountant of Court | | Gilray | i, 209 |
| Adam | | M'Dougal and Ferguson | ii, 198, 374 |
| Adam | | Sutherland | ii, 376, 379, 403 |
| Adam and another | | Napier | ii, 301 |
| Adam and others | | Banton & Co. | ii, 589 |
| Adamson | | Balmerino, Lord | ii, 613 |
| Adamson | | Marshall | ii, 253 |
| Adamson | | Strathlaw, Tenants of | i, 263; ii, 200 |
| Addie | | Young | ii, 192, 491 |
| Advocate-General | | Sinclair and others | i, 372; ii, 533 |
| Advocate, the Lord, and Riddel | | Ardnamurchan, Tenants of | ii, 7, 8 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--------------------------------------|--------------------------------------|-------------------------------|
| Advocate, the Lord | Campbell | i, 83 |
| Advocate, the Lord | Excommunicants, some | ii, 526 |
| Advocate, the Lord | Forgan | ii, 610 |
| Advocate, the Lord | Fraser | i, 61, 446, 468 |
| Affleck | Affleck | ii, 480 |
| Affleck, Lord | Mathie | i, 362, 364, 366; ii, 303 |
| Aglionby | Watson and others | i, 230; ii, 447 |
| Agnew | Cassillis, Earl of | i, 424, 487 |
| Agnew | Corcaphie | ii, 3 |
| Agnew | Gillespie | i, 103 |
| Agnew | M'Niven | i, 110 |
| Ahannay | Aiton | i, 487 |
| Ainsley | Chisholm | ii, 440 |
| Ainslie | Turnbull | ii, 307 |
| Aitchison | Benny | i, 242, 246 |
| Aitchison | Glasgow, Magistrates of | ii, 462 |
| Aitchison | Mansfield, Earl of | ii, 544 |
| Aitken | Reid | ii, 322 |
| Aitken's Trustees | Shanks and Waddell | ii, 217 |
| Alexander | Alexander | ii, 586 |
| Alexander | Anderson | i, 347 |
| Alexander | Couper | ii, 191 |
| Alexander | Dornoch, Tenants of | ii, 7 |
| Alexander | Jackson, | ii, 122, 128, 138 |
| Alexander | Thomson | i, 169 |
| Alison | Campbell's Creditors | ii, 371, 373, 436 |
| Alison | Proudfoot | i, 218, 237, 240 |
| Alison | Ritchie | i, 467, 476 |
| Allan | Aberdeen, College of | i, 137 |
| Allan | Berry | ii, 493 |
| Allan | Dunlop and Husband | ii, 308 |
| Allan | Elder and others | ii, 609 |
| Allan | Macrae | i, 160 |
| Allan | Maitland and Campbell | ii, 308 |
| Allan | Maxwell | ii, 308 |
| Allan | Thomson | ii, 495 |
| Allan and others | Walker | ii, 22, 54 |
| Altham | Smith | i, 62 |
| Amos and Dunlop | E. of Dalhousie | ii, 338 |
| Anderson, petitioner | | ii, 467 |
| Anderson | Abel | ii, 267, 544 |
| Anderson | Alexander and Miller | i, 232, 242, 244, 246, 482 |
| Anderson | Anderson | ii, 577 |
| Anderson | Gordon and others | ii, 248 |
| Anderson | Kerr | ii, 607 |
| Anderson | Kinnear | ii, 197 |
| Anderson | Linlithgow, Magistrates of | ii, 289 |
| Anderson, J. and D. | M'Callum and others | ii, 202 |
| Anderson | Parishioners | i, 135 |
| Anderson | Provan and Town of Edinr. | ii, 175, 364, 388, 411 |
| Anderson | Renfrew, Magistrates of | i, 160 |
| Anderson | Thomson | i, 311 |
| Anderson and Duncan | Tod | ii, 488 |
| Anderson | Yule | ii, 19 |
| Andrew | Morrison, | i, 314, 325; ii, 219 |
| Andrew and others | Colquhoun | ii, 98 |
| Andrews, St, Archbishop of | Glasgow, Magistrates of | i, 160 |
| Andrews, St, Archbishop of | Roxburgh, Lord | ii, 46 |
| Andrews, St, Commissary of | Watson | ii, 397 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---------------------------------------|--|--------------------------------------|
| Annand | Chessels | i, 164 |
| Annand, Viscount | Elliston and Scott, Tenants of | ii, 438 |
| Annand | Grant | ii, 468 |
| Annand | Tenants | ii, 69 |
| Annandale, Earl of | Nithsdale, Earl of | ii, 611 |
| Anstruther | Anstruther and others | i, 90 |
| Anstruther | Greenahields | ii, 606 |
| Anstruther | Spence | ii, 359 |
| Arbuthnot | Campbell | i, 431 |
| Arbuthnot | Colquhoun | i, 481; ii, 238, 257 |
| Arbuthnot | Finnart's Creditors | ii, 342 |
| Arbuthnot | Reid | i, 434, 449 |
| Ardross, Heirs of | Dishington | ii, 12 |
| Ardwell | M'Culloch | ii, 12 |
| Argyle, Bishop of | Argyle, Commissary of | i, 526 |
| Argyle, Bishop of | Walker | i, 526, 529 |
| Argyle, Countess of | Dollar, Tenants of, and the Earl of Argyle | i, 214 |
| Argyle, Countess of | Moray, Sheriff of | ii, 39 |
| Argyle, Duke of | Cunningham | ii, 64 |
| Argyle, Duke of | M'Allister | i, 262 |
| Argyle, Duke of | M'Arthur | ii, 472 |
| Argyle, Duke of | Russel | ii, 30, 54 |
| Argyle, Earl of | Campbell | ii, 45 |
| Argyle, Earl of | M'Naughten | ii, 71 |
| Arkwright | Billinge | i, 297, 298, 299, 311, 313, 316, 319 |
| Armour | Lands | i, 167, 373 |
| Armstrong and Smith | Bryceson | ii, 444, 473 |
| Arnott | Bell | ii, 127 |
| Arnott | Currie | i, 262 |
| Arnott | Greig | ii, 610 |
| Arnott | Hay | ii, 11 |
| Arnott | Tenants | i, 446 |
| Arnott and others | Brown and Common | ii, 558 |
| Arthur | Holemill, Tenants of | i, 526 |
| Ashhurst | Cliftonhall | i, 426 |
| Athole, Duke of, petitioner | | i, 334 |
| Athole, Duke of | Maule | i, 280 |
| Athole, Duke of | Wedderburn | i, 281 |
| Athole, Earl of | Robertson | i, 78 |
| Auchinbreck's Factor | Macaulachlan | i, 480 |
| Auld | Baird | i, 293, 294 |
| Auld | Yule and Auld | ii, 10, 13, 14 |
| Avery | Chemlyn | i, 309 |
| Aytoun, Tutor of | | i, 185 |
| Aytoun, Lady | Hume | ii, 66, 328 |
| Aytoun, Lady | Tenants | i, 424, 474, 484, 486 |

B

| | | |
|------------------------------|------------------------------|-----------------------|
| B, Laird of | A Poor Boy | i, 370 |
| Baillie | Cuthbert | ii, 329 |
| Baillie | Fraser | i, 375, 362; ii, 288 |
| Baillie | Hay | i, 242 |
| Baillie | Latham | i, 166 |
| Baillie | Lockhart | ii, 340 |
| Baillie | Mackay | ii, 472 |
| Baillie | Somerville | i, 362, 364, 366, 369 |
| Baillie and others | M'Kensie | i, 339 |
| Bein | Stewart and others | i, 410; ii, 26 |

| <i>Petitioners.</i> | <i>Defenders.</i> | PAGE |
|--|--|---------------------------|
| Baird | Faulds and others | ii, 618 |
| Baird | Graham | ii, 641 |
| Baird | Mount | ii, 255, 446, 499, 536 |
| Baird | Inglis | ii, 223, 256 |
| Baird | Harper | ii, 486, 491 |
| Baird and Fraser | Brown and Gordon | ii, 607 |
| Balcangubal | Craig | ii, 571 |
| Balfour | Cardross, Parishioners of | i, 490 |
| Balfour | Lyle | i, 413; ii, 346 |
| Balfour, Parson of Fliak | Parishioners | i, 474 |
| Balgonic | Hay | ii, 324 |
| Bald's Trustees | Allea Colliery Co. and Earl of Mar | ii, 518, 539 |
| Ball, petitioner | Argyle, Duke of | i, 179, 186 |
| Ballandean | Bonar's Relict | ii, 324 |
| Ballantine | Ramsay | i, 253 |
| Ballantine | Watson | ii, 609 |
| Ballardie | Bisset | i, 268 |
| Balmer | Hogarth | ii, 183 |
| Bahuerinloch, Abbot of | Grange Durham | ii, 437 |
| Bandeane | Belgerno | i, 74; ii, 575 |
| Banff, Laird of | Tenants | ii, 10 |
| Banff, Lord | Joass | ii, 326 |
| Bannatine | Finlayson | ii, 364 |
| Bannatine | Scott | ii, 171 |
| Bannatine's Trs. | Cunningham | ii, 341 |
| Barbour | Bell and Cautioners | ii, 24, 525 |
| Barclay | Fife, Earl of, and others | ii, 233, 246, 250, 253 |
| Barclay | St Andrews, College of | i, 139 |
| Barclay | Simpson | ii, 287 |
| Bargenie, Lord | Stewart | i, 531 |
| Barns | Allan & Co. | ii, 398 |
| Barr | Macilwham and Speirs | i, 318 |
| Barrack, Lady | Reisgill, Tackman of | ii, 129 |
| Bartlett | Stewart | ii, 33 |
| Bathie | Wharnccliffe | i, 371, 431, 437 |
| Baxter | Monro | i, 166 |
| Baxter | Paterson | ii, 191 |
| Bayne | Walker | ii, 452 |
| Beaton, petitioner | Scott | i, 175, 185 |
| Beaton | Lambie | ii, 530 |
| Beattie | Low | i, 260 |
| Beck, Judicial Factor of Lochmaben | Rebow | i, 308 |
| Beck | Brown | i, 155, 157 |
| Begbie | Boyd | i, 315, 373 |
| Begbie and others | Frame | ii, 202, 510 |
| Begbie, Wiseman, & Co. | Lowden, Tenants of | ii, 360 |
| Belchies | Moffat | i, 128 |
| Belchier | Luss, Lady | i, 326, 328 |
| Belhaven, Viscount | Gunn | i, 179, 186 |
| Bell, petitioner | Queensberry, Duke of | ii, 351 |
| Bell | Queensberry, Executors of the | ii, 302 |
| Bell | Duke of | ii, 267, 270 |
| Bell and others | Henderson | ii, 552 |
| Bell, J and A. | Lamont and others | i, 481; ii, 238, 240, 257 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---------------------------|-----------------------------|------------------------|
| Belshes | Fraser | ii, 316 |
| Belshes and Thomson | Caddell | ii, 331 |
| Beman | Rufford | i, 349 |
| Bennet | Foulden | ii, 441 |
| Bennet | Turnbull | i, 484 |
| Bennie | Mack | ii, 423 |
| Berry | Allen | i, 331 |
| Bervickshire, Justices of | Cockburnspath, Tenants of | ii, 323 |
| Bethune | Cockburnspath, Tenants of | i, 539 |
| Bethune | Morgan | ii, 165, 473, 540 |
| Bethune | Jervise | ii, 207 |
| Bethune's Tenants | Bethune | ii, 38, 123 |
| Bett and others | Murray | i, 523; ii, 38 |
| Bigger | Scott | ii, 406 |
| Binning | Douglas | i, 363, 364, 366 |
| Binning, Lady | Sinclair | i, 236, 238-9; ii, 123 |
| Binny | Binny | ii, 325 |
| Binny | M'Lean | ii, 449 |
| Birkbeck | Ross | i, 454, 492 |
| Bisset | Caldwell | ii, 375 |
| Bisset | Whitson | ii, 641, 644 |
| Blackadder | Cockburn | ii, 444 |
| Blackburn | Gibson | ii, 577 |
| Blackburn | Wilson | ii, 437 |
| Blackburn or Brown | Inverkeithing, Town of | i, 283 |
| Blackwood | Alexander | ii, 375 |
| Blaikie | Farquharson | ii, 339 |
| Blain | Ferguson and Hunter | i, 523; ii, 30, 32, 56 |
| Blair | A | ii, 577 |
| Blair | Blair | i, 83, 493 |
| Blair | Brown | ii, 136 |
| Blair | Lyall | ii, 433 |
| Blair | Miller | i, 286 |
| Blair | Robson | ii, 450 |
| Blair and others | Galloway and others | ii, 574 |
| Blairquhan, Laird of | Crauford | ii, 69 |
| Blanc | Graig | ii, 509 |
| Blanc | Morrison and others | ii, 175, 412 |
| Blanc | Winraham | ii, 323 |
| Blount | Pairman | i, 414 |
| Blyth | Craig | i, 209; ii, 113 |
| Boase | Jackson | i, 414 |
| Bogle | Bogle | i, 104, 106 |
| Bogue | Wight | ii, 208 |
| Bontine | Bontine | i, 90, 93, 104 |
| Bontine | Carrick | i, 123 |
| Boog | Jamieson | ii, 160 |
| Boog and Thomson | Burntialand, Magistrates of | i, 342 |
| Borrows and Connor | Colquhoun and M'Lean | i, 246; ii, 107 |
| Borthwick | St Andrews, Archbishop of | i, 249 |
| Borthwick, Lady | Cateune, Tenants of | ii, 345 |
| Borthwick, Lady | Scott | ii, 69, 70 |
| Borthwick, Lord | Sym | ii, 50 |
| Boeswell | Tenants | ii, 124 |
| Bow | Stirling, Provost of | i, 144 |
| Bowack | Croall | i, 238, 496 |
| Bowhill | Jackson | ii, 443 |
| Bowie | Duncan | ii, 281, 285 |
| Bowis | Barclay | ii, 426 |
| Bowten, Vicar of | Cockburn | i, 71, 77 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|----------------------------------|---|
| Boyd | Alexander | i, 221 |
| Boyd | Boyd | i, 123; ii, 69 |
| Boyd | M'Garra | ii, 16 |
| Boyd | M'Kenna | i, 411 |
| Boyd | Millers | ii, 352 |
| Boyd | Russell | i, 328, 328, 329 |
| Boyd | Sinclair | i, 234 |
| Boyd | Storie | ii, 440 |
| Boyd, Lord | Advocate, King's | i, 212, 213 |
| Boyes and others | Henderson | ii, 465 |
| Boyle | Crawford | i, 163, 164, 165 |
| Boyle, Lord, and others | Pollock | ii, 459 |
| Boyn, Lady | Tenants | ii, 61, 67 |
| Braco, Lord | Innes | i, 362, 364, 365, 369 |
| Brand's Tra. | Brand's Tra. | i, 321 |
| Breadalbane, Earl of | Livingston | i, 322 |
| Breadalbane, Earl of | M'Lauchlan | ii, 575, 576 |
| Breadalbane's Tra., Marquis of | Cambell | ii, 935 |
| Breadalbane, Marquis of | M'Gregor and others | ii, 187 |
| Brewhouse | Robertson | i, 262 |
| Bridgeham | Frontee | i, 200 |
| Brims | Ferrier | ii, 424 |
| Brisbane's Trustees | Lead, J. and J. | ii, 246, 527 |
| Broadwood | Hunter | ii, 547 |
| Brock | Buchanan | ii, 480 |
| Brock | Cabbell | i, 362, 497, 504, 505, 510; ii, 592 |
| Brock | Cochrane | i, 222 |
| Brodie | Murdoch | ii, 482 |
| Broomfield | Young | ii, 530 |
| Brown, petitioner | | i, 181, 184, 186 |
| Brown or Sharpe, and W. Sharpe, petitioners | | i, 176 |
| Brown | | i, 214 |
| Brown | Birtwhistle | ii, 349 |
| Brown | Brown | i, 461 |
| Brown | L. of C. | ii, 126 |
| Brown | Fletcher | i, 263 |
| Brown | Hill | ii, 54, 55 |
| Brown | Lang | ii, 16, 18, 19 |
| Brown | M'Kell | ii, 72 |
| Brown | Maxwell | ii, 461 |
| Brown | Ogilvie | i, 443; ii, 10 |
| Brown | Paterson | i, 210 |
| Brown | Peacock | ii, 26, 31, 38, 55 |
| Brown | Robertson | ii, 191 |
| Brown | St Andrews, College of | i, 372; ii, 489, 493 |
| Brown | Sinclair | ii, 369 |
| Brown | Weir and Curators | ii, 318, 322 |
| Brown and Thomson | Gardner | ii, 281 |
| Bruce | Bruce | i, 105, 119, 266, 509, 528; ii, 189, 197, 318 |
| Bruce | Buchan | ii, 441 |
| Bruce Stuart | Erskine | i, 260, 263-4 |
| Bruce | Grant and Tenants | ii, 353 |
| Bruce | Hunter and Leisak | i, 129; ii, 18 |
| Bruce | Kinloch | ii, 604 |
| Bruce | M'Leod | ii, 238 |
| Bruce and Co. | Beath | ii, 464 |
| Brunton, Lady | | ii, 330 |
| Brydges | Fordyce | ii, 326, 337 |
| Bryson | Weir | ii, 201 |

| <i>Petitors.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--------------------------------|--|---------------------------|
| Buccleuch, Duchess of | Davidson | ii, 50 |
| Buccleuch, Duke of | Edinburgh, Magistrates of | i, 378 |
| Buccleuch, Duke of | Elliot | ii, 584 |
| Buccleuch, Duke of | Ewart | i, 92 |
| Buccleuch, Duke of | Grierson and Duke of Queensberry's Executors | ii, 528 |
| Buccleuch, Duke of | Hyslop | ii, 527 |
| Buccleuch, Duke of | M'Murdo and Duke of Queens- berry's Executors | ii, 529 |
| Buccleuch, Duke of | M'Turk | ii, 441, 444 |
| Buccleuch, Duke of | Queensberry's Executors, Duke of | i, 103, |
| | 107, 112, 114, 115, 123 | |
| Buccleuch, Duke of | Tod's Tra. | i, 312; ii, 219 |
| Buccleuch, Lord | Tenants | ii, 51 |
| Buchan | Leith | ii, 281 |
| Buchan | Nisbet | ii, 607 |
| Buchan | Scott | ii, 613 |
| Buchan's, Earl of, Trustees | Cardross, Lord | ii, 345 |
| Buchanan | Baird | i, 365 |
| Buchanan | Baird and others | i, 365 |
| Buchanan | Malcolm | ii, 200 |
| Buchanan | Muirhead and others | ii, 567 |
| Buchanan | Stark | ii, 220 |
| Buchanan | Yuille | ii, 13 |
| Buchanan and Anderson | Glasgow, Magistrates of | ii, 200 |
| Buckland | Butterfield | i, 297, 304, 305, 324 |
| Buckly | Taylor | ii, 378 |
| Budge | Brown's Trustees | ii, 612 |
| Budge | Sinclair | ii, 71 |
| Buittle, Minister of | | i, 137 |
| Bullions | Bayne | i, 163, 164, 165 |
| Burdon | Dick | ii, 138 |
| Burnett | Aberdeen | i, 471 |
| Burnett | Fraser | i, 517 |
| Burnett | M'Kinning and Forbes | i, 436, 449 |
| Burnett and others | Simpson and others | i, 139, 141 |
| Burnet | Stewart | ii, 267 |
| Burns and Grier | Stewart | ii, 462 |
| Bute, Earl of | M'Kenzie | i, 169 |
| Butter | Harvie | ii, 11 |
| Butter | Loch | ii, 462 |
| Butter | M'Donald | i, 68; ii, 4 |
| Butter | M'Vicar | i, 326, 328, 329; ii, 368 |
| Butter | Riddell | ii, 392 |
| Byres | Law | i, 447 |

C

| | | |
|----------------------------------|----------------------------------|-------------|
| Cabbell | Brook | i, 504, 505 |
| Caddell | Burns | ii, 318 |
| Cadzow | Lockhart | ii, 548 |
| Cairns | Gerrard | i, 440 |
| Caithness, Bishop of | Vassals | i, 72 |
| Caithness, The Master of | Caithness, The Earl of | i, 170 |
| Calder | Downie | i, 209 |
| Calderwood | Smith | ii, 15 |
| Caldwell | Stirk | ii, 341 |
| Caledonian Railway Company . . . | Barr and Arthur | ii, 669 |
| Caledonian Railway Company . . . | Buchanan and others | ii, 514 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|---|----------------------|
| Caledonian Railway Company | Greenock and Wemyss Bay Railway Company | ii, 560 |
| Callender | Tenants | ii, 303 |
| Callender, Countess of | Campbell | ii, 375, 376 |
| Calpie | Kennedy | ii, 143 |
| Cameron | Cameron | ii, 131, 544 |
| Cameron | M'Donald | ii, 73 |
| Cameron | Robertson | ii, 19 |
| Campbell | Anstruther and others | i, 257; ii, 333 |
| Campbell | Argyle, Duke of | ii, 76 |
| Campbell | Brown | ii, 223, 617 |
| Campbell | Buchanan | ii, 49 |
| Campbell | Calder Iron Company | i, 216, 585 |
| Campbell | Campbell | i, 263; ii, 333 |
| Campbell | Campbell | i, 176 |
| Campbell | Campbell | i, 284 |
| Campbell | Campbell | i, 274; ii, 210 |
| Campbell | Campbell | i, 341 |
| Campbell | Campbell | ii, 332, 333 |
| Campbell | Campbell and others | ii, 320, 326 |
| Campbell | Carruthers | ii, 450 |
| Campbell | Cunningham | i, 234 |
| Campbell | Dougal | i, 371 |
| Campbell | Douglas | i, 91; ii, 236 |
| Campbell | Gallanach | i, 231 |
| Campbell | Gemmil | ii, 266 |
| Campbell | Grant | i, 275 |
| Campbell | Howden | i, 314; ii, 246, 251 |
| Campbell | Johnston | ii, 46, 49 |
| Campbell | Love | i, 111 |
| Campbell | M'Alister | ii, 140 |
| Campbell | M'Kellar | ii, 8, 10 |
| Campbell | M'Kinnon | i, 464, 467, 478 |
| Campbell | M'Lean | i, 269 |
| Campbell | M'Laurin | ii, 26, 151, 502 |
| Campbell | M'Pherson and Campbell | i, 432, 441 |
| Campbell | Ralston | ii, 506 |
| Campbell | Robertson | i, 364, 439; ii, 126 |
| Campbell | Siller | i, 467; ii, 578 |
| Campbell | Watt | ii, 460 |
| Campbell | Welsh | ii, 617 |
| Campbell & Co. | Edinburgh, Magistrates of; Boyd and Latta | i, 342 |
| Campbell and Hogarth | Borwall | ii, 423, 549 |
| Campbell and Stewart | Campbell | i, 537 |
| Campbell's Creditors | Campbell | ii, 342 |
| Campbell's Executors | Campbell | i, 274; ii, 225 |
| Campbellton, Mags. of | Galbraith | i, 343 |
| Caprington, L. of | Geddeu | i, 371 |
| Cardross | Colville or Somerdike | i, 144 |
| Cardross | Hamilton | ii, 577 |
| Cardross, Lady | Hamilton's Representatives | i, 86; ii, 250, 254 |
| Cardross, Lady | Wight | i, 86 |
| Cardross, The Factor on the Estate of | Baxter | ii, 429 |
| Cargill | Tasler | ii, 312, 313 |
| Cargill, Heritors of Parish of | Gordon | i, 106 |
| Carlton, Creditors of | Lawson | ii, 28 |
| Carlyle | Lowther | i, 172; ii, 23, 577 |
| Carlyle | Bertram | ii, 59 |
| Carmichael | Chancellor | i, 165 |
| Carmichael | | |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|---------------------------------------|-------------------------------------|
| Carmichael | Colquhoun | i, 283 |
| Carmichael | Peter | ii, 269 |
| Carmichael | Tait and Fraser | ii, 301 |
| Carnegie | Brechin, Magistrates of | i, 283 |
| Carnegie | Guthrie | ii, 500 |
| Carnegie | Kintore, Lord, and Gemmill | i, 338 |
| Carnegie | Scott | i, 287, 478; ii, 527 |
| Carnegie | His Tenants | ii, 122 |
| Carnegie, Lady | Her Husband's Executors | ii, 328 |
| Carnousie | Keith | i, 522 |
| Carron Iron Company | Donaldson | ii, 479, 536 |
| Carra | Cairns | i, 105 |
| Carrubbers Close, Proprietors in | Reoch | ii, 554 |
| Carruthers | Irvine | i, 372, 462 |
| Carruthers | M'Garroch | ii, 125, 139 |
| Carruthers | Thomson | i, 435; ii, 285, 596 |
| Carruthers and others | Stormont, Viscount | ii, 74 |
| Carse | Cunningham | ii, 611 |
| Carson | Millar | ii, 193 |
| Carstairs | Brown and others | ii, 188 |
| Caskieben, Lord | Clark | i, 269 |
| Casillis | Galloway, Sheriff of | ii, 200 |
| Casillis, Earl of | Finlay | ii, 318 |
| Casillis, E. of | Lochinvar | ii, 197 |
| Casillis, E. of | M'Adam | i, 94, 237, 241 |
| Casillis, E. of | Maybole, Heirs of | i, 262 |
| Casillis, E. of | Ramsay's Creditors | ii, 386, 387 |
| Casillis, E. of | Tenants | ii, 69 |
| Casillis, Tutor of | Lochinvar | i, 424 |
| Cathcart | Black | ii, 49 |
| Cathcart | Mitchell and others | ii, 288 |
| Cathcart, Lord | Schaw | i, 106, 122, 123, 273, 274, 344 |
| Cathcart | Sloss | ii, 415 |
| Cathie | Musselburgh, Magistrates of | i, 155 |
| Catterns | Tennent | i, 286, 287, 292, 293, 294; ii, 385 |
| Cauder | Hamilton | ii, 112 |
| Cauvin | Robertson | ii, 449 |
| Cawfield, petitioner | Wilson | i, 183 |
| Chalmers | M'Duff | ii, 462 |
| Chartars | Halliburton | i, 362, 364, 366 |
| Chatto, Lady | Hampson | ii, 72 |
| Cheethow | Coulter, L. of | ii, 568 |
| Cheyne | Parke | i, 74 |
| Chirnside | M'Donald | ii, 56 |
| Chisholm | Chisholm | i, 103 |
| Chisholm's Trustees | Landale | ii, 236 |
| Christie | M'Pherson | i, 342, 343 |
| Christie | Stirling, Magistrates of | ii, 178, 390, 412 |
| Christie | Ker | i, 144, 145 |
| Christians | Brown | i, 76, 104, 106 |
| Church | Sharpe | i, 236 |
| Church | Currie | i, 409, 412 |
| Churchside | Balnarnock, Tenants of | i, 207 |
| Clackmannan, L. of | Edinburgh, Magistrates of | i, 464 |
| Clapperton and others | Baird | i, 345; ii, 190 |
| Clark | Bennet and Miles | ii, 222 |
| Clark | Brodie | ii, 142 |
| Clark | Clark | ii, 240 |
| Clark | Dallas | i, 121 |
| Clark | Duncan | ii, 450 |
| Clark | | ii, 423, 429 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|--|-----------------------|
| Clark | Farquharsen | i, 449, 452 |
| Clark | Gordon | ii, 268 |
| Clark | Hope | i, 271 |
| Clark | Hume | ii, 600 |
| Clark | Lamont | i, 441, 473 |
| Clark | Ross | ii, 574 |
| Clark | Sharpe | i, 214 |
| Clark and Miller | Finlay | ii, 257 |
| Clark's Creditors | Dewar | ii, 448 |
| Clark's Creditors | Gordon | i, 85, 169 |
| Clark's Trustees | Hill | i, 288 |
| Cleghorn, L. | Crawford | ii, 133 |
| Cleghorn, L. | Tenants, his Father's | ii, 438 |
| Cleghorn's Escheat, Donator of | Tenants | ii, 437 |
| Clelland | Crawford | ii, 342 |
| Clugstone | Goold | ii, 541 |
| Cochrane | Black | i, 210 |
| Cochrane | Crawford | i, 478 |
| Cochrane | Guthrie | ii, 521, 522 |
| Cochrane | Hamilton | ii, 280 |
| Cochrane | Manson | ii, 312 |
| Cochrane and others | Ferguson | ii, 153, 466 |
| Cockburn | Burn | i, 164 |
| Cockburn | Cockburn | i, 227 |
| Cockburn | Dunee, Feuars of | i, 261 |
| Cockburn | Stewart | ii, 445 |
| Cockburn | Trotter | ii, 405 |
| Cockburn and others | Samson | i, 466 |
| Cockburn's Tutors | Cockburn | i, 209; ii, 114 |
| Coldingknowes, Lady | Tenants | ii, 72 |
| Colegrave | Dias Santos | i, 305 |
| Collart | Avondale, Lady | ii, 12 |
| Collet | Balmerino, The Master of | ii, 613 |
| Collins | Hamilton and others | ii, 560, 563 |
| Colliston, L. | Errol, the Earl of | ii, 197 |
| Colquhoun | Buchanan and others | ii, 192 |
| Colquhoun | Montrose, Duke of | i, 280 |
| Colquhoun | Watson | ii, 207 |
| Colt | Colt | i, 176, 177, 178, 179 |
| Commissioners of Annexed Estates | M'Nab | ii, 49 |
| Cooke | Humphrey | i, 299, 308 |
| Cooper | Bone and Black | ii, 401 |
| Cooper | Bruce | i, 136; ii, 81 |
| Cooper | Campbell | ii, 209, 210 |
| Cooper | Eglinton's Trustees, Earl of | ii, 428 |
| Cooper | Leslie | i, 429 |
| Copland | Maxwell | i, 283 |
| Copley | Day | i, 408, 414 |
| Corbet | Vans | ii, 197 |
| Coreseburn | Pollock | i, 344 |
| Coresehill, L. of | Wilson | i, 462, 474, 486, 488 |
| Corstorphin, Master of | Tenants | ii, 445 |
| Cossar | Home | ii, 60, 127 |
| Coster | Cowling | i, 414 |
| Court, Accountant of | Gilray | i, 209 |
| Couston | Pitreavie, Tenants of | i, 263 |
| Cowan | Brownlee | i, 369 |
| Cowan | Edinburgh, Magistrates of | i, 342, 343 |
| Cowan | Perry | ii, 377, 378 |
| Cox | Stead and others | i, 320, 324; ii, 594 |
| Craich | Napier | i, 170 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|---------------------------------------|--|
| Craig | Edinburgh Street Tramway Co. | ii, 306 |
| Craigdallie and others | Aikman | i, 160 |
| Craighall, L. of | Kininmonth | ii, 32, 197 |
| Craighall, Tenants of | Kininmonth | i, 74 |
| Craigie | Reid | ii, 71 |
| Craigie, A. and W. | Gordon and others | i, 83 |
| Craigie, L. of | Tenants | ii, 138 |
| Craigmillier, L. | Chalmers | ii, 28 |
| Cranstoun | Brown | ii, 53 |
| Cranstoun and others | Scott | ii, 578, 588 |
| Cranstoun, Lord, Creditors of | Scott | i, 443, 480, 492; ii, 578 |
| Craw | Craw | ii, 44 |
| Crawford | Boyle and others | i, 84 |
| Crawford | Gordon | ii, 320, 471 |
| Crawford | Halkerston | i, 246 |
| Crawford | Kennedy | i, 283 |
| Crawford | Maxwell | ii, 459 |
| Crawford | Ritchie | i, 238, 240, 249, 250; ii, 391, 585, 588 |
| Crawford | Stewart | ii, 348 |
| Crawford | Torrance | i, 454; ii, 368, 386, 387, 391, 393 |
| Crawford | Whiteford | i, 91; ii, 237 |
| Crawford, Lady M. | Dixon | i, 248; ii, 81 |
| Crawford of Jordanhill's Creditors | Crawford, The Earl of, | ii, 516, 552 |
| Crawfordjohn, Lady | Glaspin, | i, 104, 10 |
| Crawshaw | Maule, | i, 125 |
| Crichton | Air, Lord | i, 215 |
| Crichton | Anderson | i, 372, 462 |
| Crichton | Carruthers | ii, 577 |
| Crichton | Crichton | i, 470 |
| Crichton | Laing, Meason, and Taylor | i, 170 |
| Crichton | N | i, 520; ii, 273 |
| Crichton | Queensberry, Earl of | ii, 359 |
| Crichton and others | Keith and others | ii, 370, 374, 414 |
| Croker | Stevenson, | i, 228; ii, 140, 480 |
| Croker | Warner and others | i, 272 |
| Cromer | Gordon, Duke of, and Factor | ii, 550 |
| Crosbie | Bell | ii, 94 |
| Crosbie | Donaldson | ii, 407 |
| Crosbie, L. of | Hume | i, 486 |
| Cross | Muirhead | ii, 24 |
| Crossaquel, Abbot of | Hamilton | ii, 26, 151, 502 |
| Craickshank, | Sandeman | i, 70, 77 |
| Culling | Tuffnal | ii, 328 |
| Culter, L. of | Bayley | i, 301 |
| Cumine | Gordon | i, 447 |
| Cumming, Gordon | Lumsden | ii, 229 |
| Cumming | Williamson | i, 105, 106 |
| Cumming and others | Simpson and others | ii, 383, 401 |
| Cumming's Trustees | Caprington, Laird of | ii, 283 |
| Cumnock, Parishioners of | Cooke | ii, 463, 464 |
| Cunningham | Crawford | i, 71 |
| Cunningham | Grieve | ii, 72 |
| Cunningham | M'Culloch | i, 447 |
| Cunningham | Miller | i, 217, 220, 225 |
| Cunningham | Polmont, Tenants of | ii, 28, 197 |
| Cunningham | Taylor and others | ii, 460 |
| Cunningham | Warner | ii, 345 |
| | | i, 282 |
| | | ii, 518 |

| <i>Pursuers.</i> | <i>Defenders.</i> | PAGE |
|-------------------------|------------------------------|------------------|
| Cunningham | Williamson | ii, 612 |
| Cunninghame | Haliburton | ii, 128 |
| Cunninghame & Co. . . . | Hamilton & Co. . . . | ii, 124 |
| Cuninson | Stuart or Somerville | ii, 363, 399 |
| Currie | Crawford | ii, 414 |
| Cuthbert | Inverness, Town of | i, 260, 261, 264 |
| Cuthill | Jeffrey | ii, 597, 601 |
| Cutler | Wauchope | ii, 303 |

D

| | | |
|-------------------------------|--|---------------------------------|
| Daer | Hamilton, Duke of | ii, 335 |
| Dalglish | Dundas, Lord | i, 261 |
| Dalhousie, Earl of | Orokat | ii, 336, 341 |
| Dalhousie, Earl of | Dunlop & Co. | ii, 399, 400 |
| Dalhousie, Earl of | Maule | i, 237 |
| Dalhousie, Earl of | Wilson | i, 191; ii, 127, 587 |
| Dallas | Fraser | i, 374 |
| Dalry, Minister of | Newal | i, 144 |
| Dalrymple | Charles | ii, 15 |
| Dalrymple | Douglas | ii, 15 |
| Dalrymple | Hepburn | i, 491 |
| Dalrymple | Kennedy | ii, 571 |
| Dalrymple, Hay | Mactier and Gilchrist | i, 418 |
| Dalziel | Caldwell, Tenants of | i, 85, 446 |
| Dalziel | Lockhart | ii, 249 |
| Dalziel and others | Queensberry's Executors, Duke of | ii, 541, 549, 553 |
| D'Arey, Lord | Aswick or Aakwith | i, 299 |
| Darg | Darg | ii, 167, 168 |
| Darnley, Lord | Campbell | i, 344, 529; ii, 54, 88 |
| Darroch | Renny | i, 238, 250 |
| Davidson | Boyd | ii, 438, 439 |
| Davidson | Douglas | i, 412; ii, 353 |
| Davidson | Dunbar | ii, 844 |
| Davidson | Falconer | ii, 618 |
| Davidson | Gordon | ii, 15 |
| Davidson | Murray | ii, 630 |
| Davidson | Oswald and others | ii, 567 |
| Davidson and others | Aikman | i, 180 |
| Davidson and others | Girvan | ii, 53, 117 |
| Davis | Jones | i, 306, 224 |
| Dawling's Cairns | Balmerinoch, Lord | ii, 441 |
| Dawson | Pringle | ii, 531 |
| Dawson | Stewart | i, 454 |
| Day | Austin | i, 308 |
| Dean | Allalley | i, 305 |
| Dean | Irvine, Magis of | i, 149, 150, 150, 152, 153, 244 |
| Deans | Abercromby | ii, 223, 457 |
| Deas | Kyle | ii, 180 |
| Deas | Scougal and Sample | ii, 466 |
| Deas | Walker | ii, 617 |
| Dempster | Cleghorn | i, 150 |
| Dempster | M'Donald | ii, 188 |
| Denham | Wilson | i, 112 |
| Denniston | M'Linto | ii, 351 |
| Denniston, M'Nair & Co. . . . | M'Farlane | i, 130, 215, 216; ii, 3 |
| Deuchar | Minto, Earl of | i, 220, 225, 226, 250 |
| Devon Iron Co. | Manafield, Earl of | ii, 261 |

| <i>Petitors.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|--------------------------------|---------------------------------|
| Dewar | Moray, Countess of | ii, 415 |
| Dick | — | ii, 138 |
| Dick | Drysdale | i, 90 |
| Dick | Frame and Lang | ii, 96 |
| Dick | Lands | ii, 389 |
| Dick | Robertson | ii, 346 |
| Dick | Skalla | i, 246; ii, 142 |
| Dick | Stewart | ii, 349 |
| Dick | Taylor's Trustees, | ii, 272, 273 |
| Dickenson | Biaset | i, 82 |
| Dickson | Campbell | ii, 300 |
| Dickson | Dickie | ii, 193 |
| Dickson | Dickson | i, 210, 211 |
| Dickson | Douglas | i, 126, 127, 128 |
| Dickson | Kerr and others | ii, 630 |
| Dickson | Porteous | ii, 284 |
| Dickson | Tweedie | ii, 32, 33 |
| Dickson | Watson | ii, 607 |
| Dillon | Campbell | ii, 232 |
| Dingwall and Curator | Duff | i, 127 |
| Dirom | Little | i, 280, 282 |
| Dixon | Campbell | ii, 458, 521, 522 |
| Dixon | Fisher | i, 297, 299, 312, 320, 321, 324 |
| Dobbs | Lothian, M. of | ii, 585, 587, 592 |
| Dods | Fortune | ii, 285, 417 |
| Dods | Walker | i, 379 |
| Doe | Avis and others | i, 413 |
| Don, Cotel Fishers of | — | i, 280 |
| Donaldson | Tenants | ii, 141 |
| Douglas | Cranston | i, 84 |
| Douglas | Dowie | i, 155 |
| Douglas | Graham | i, 210, 211 |
| Douglas | Iddington | ii, 65, 136 |
| Douglas | Jones | i, 186; ii, 228 |
| Douglas | Tenants | ii, 11 |
| Douglas | Vernon | ii, 571 |
| Douglas | Walker | ii, 544, 548 |
| Douglas | Wedderburn's Tenants | ii, 10 |
| Douglas, M. of | Somervell | ii, 113 |
| Douglas' Creditors | Carlyle's | i, 465, 492 |
| Douglas' Creditors | Douglas, Lady | ii, 611 |
| Doull | Homes | ii, 163, 645 |
| Doune | Niven | i, 218 |
| Dow | Buist | i, 563 |
| Dow | Hay | ii, 388, 416 |
| Dowal | Milne | i, 218 |
| Dowzie | Campbell | i, 111; ii, 268, 270 |
| Dowzie | Graham | ii, 481 |
| Drum, L. of | Jamieson | i, 490 |
| Drum, L. of | Tenants | ii, 11 |
| Drumkillo | Leing | ii, 197 |
| Drumlanrig | Cowhill | i, 76 |
| Drumlanrig, L. of | Scott | ii, 24 |
| Drummond | Hunter | ii, 261 |
| Drummond, petitioner | — | i, 179, 186 |
| Drummond | Gow | i, 448 |
| Drummond | McPherson | i, 391; ii, 130, 131 |
| Drummond | Scott | i, 431, 441 |
| Drummond | Swanston | ii, 169 |
| Dunmore, Lord, and others, petitioners | — | i, 169 |
| Drumguisil, L. of | Cleland | ii, 19, 45 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|----------------------------------|--------------------------------|-----------------------------|
| Drumquhassil, L. of | Polmaiz, Lady | ii, 359 |
| Drybrough | Drybrough | ii, 257, 288 |
| Drysdale | Jamieson | ii, 547 |
| Drysdale | Kennedy | ii, 409 |
| Drysdale and others | Wemyss | ii, 495 |
| Drysdale and others | Wood | ii, 172 |
| Ducat | Aboyne, Countess of | ii, 243 |
| Dudgeon | Howden | ii, 231, 223 |
| Dudgeon | M'Leod | ii, 199, 203 |
| Dudley, Lord | Warde, Lord | i, 297, 305 |
| Duff (of Braco) | Abstracters | i, 259 |
| Duff | Day | i, 240 |
| Duff | Fleming | ii, 261 |
| Duff | Fowler | i, 109, 241 |
| Duff | Innes | ii, 163, 465 |
| Duff and others | Laing | ii, 178, 597 |
| Duff | Wilson | ii, 178 |
| Duffy | Gray | ii, 423, 545 |
| Duke | Ferguson | ii, 489 |
| Dumbarton, Magistrates of . . | Graham | i, 280 |
| Dun | Brunton | i, 160 |
| Dun | Craig | ii, 14, 282, 449 |
| Dun | Dun | i, 224, 233 |
| Dun | Hamilton and others | ii, 559, 562, 564 |
| Dun | Johnston | ii, 609 |
| Dun | Livingston | ii, 227 |
| Dun, Lady, and Husband . . . | Dun, Lord | ii, 359, 360, 367, 393, 394 |
| Dun's Trustees | Zetland, Earl of | ii, 265 |
| Dunbar | Dundee, Earl of | ii, 165 |
| Dunbar, Competing, Heirs of . . | | i, 219; ii, 165 |
| Dunbar, Magistrates of | Kelly | i, 342, 343 |
| Dunblane, Bishop of | Drummond | i, 526 |
| Duncan | Barrow | i, 432 |
| Duncan | Barton | ii, 84 |
| Duncan | Cowie | ii, 549 |
| Duncan | M'Dougal | ii, 472 |
| Duncan | Rae | i, 228 |
| Duncan | Thomson | ii, 96, 141 |
| Duncan | Welsh | ii, 96, 141 |
| Dundas | Brown | i, 336, 328 |
| Dundas | Morrison | ii, 598 |
| Dundas and others | Hood and others | ii, 600 |
| Dundas, Lord | | ii, 30 |
| Dundas, Lord | Scott Moncrieff | ii, 532, 533 |
| Dundee, Bakers of | Dundee, Magistrates of | i, 268 |
| Dundee, Bakers of | Just and Miller | i, 263 |
| Dundee, Constables of | Strathmartin, L. of | ii, 197 |
| Dundee, Deacons of | Dundee, Magistrates of | i, 146 |
| Dundonald, Earl of | Glenagtee and Earl of Mar . . | i, 471 |
| Dunfermline, Creditors of . . . | Officers of State | i, 559 |
| Dunfermline, Earl of | The Countess | ii, 112 |
| Dunfermline, Lady | The Earl | i, 227 |
| Dunkeld, Little, Minister of . . | Heritors | i, 136 |
| Dunipace, Lady | Watson and Vert | ii, 409, 436 |
| Dunlop, Petitioner | | i, 97 |
| Dunlop & Co. | Dalhousie, Earl of | ii, 398 |
| Dunn's Trustees | Zetland, Earl of | i, 324 |
| Dunoon | Stewart | i, 447 |
| Dunsmore and others | Oswald | ii, 460 |
| Durham | Henderson and Livingston . . | ii, 587 |
| Durie, L. of | Duddingston | i, 328 |

| <i>Pursuers.</i> | <i>Defenders.</i> |
|--|--|
| E | |
| | PAGE |
| East Anglian Railway Co. | Eastern Counties Railway Co. i, 349 |
| Easton | Longlands ii, 192 |
| Edgar | Whiteheads i, 172; ii, 23 |
| Edinburgh, Bailies of | East Lothian, Heritors of ii, 455 |
| Edinburgh, Bishop of | Brown i, 73 |
| Edinburgh, Brewers of | Edinburgh, Sheriff-Depute of ii, 274 |
| Edinburgh and Glasgow Railway Co. | Stirling and Dunfermline Ry. Co. i, 358 |
| Edinburgh, Hammermen of | Stewart i, 157 |
| Edinburgh, Magistrates of | Edinburgh, College of i, 139, 140 |
| Edinburgh, Magistrates of | Edinburgh, Fleshers of i, 197, 342 |
| Edinburgh, Magistrates of | Paterson i, 149, 150, 163 |
| Edinburgh, Magistrates of | Provan's Creditors ii, 175, 385, 411 |
| Edinburgh, Merchant Company of | Heriot's Hospital, Gova. of i, 144, 145 |
| Edinburgh, Town of | Binny i, 145 |
| Edmond | Edmond i, 227 |
| Edmond | Reid i, 206, 391; ii, 131 |
| Edmonston | Bryson ii, 28 |
| Edmonston | Edmonston i, 365 |
| Edmonston | Fullarton ii, 69 |
| Edmonston | Hamilton ii, 68 |
| Edmonston | Preston ii, 453 |
| Ednam, Lady | Heir, The ii, 613 |
| Eglinton, Earl of | Ayrshire, Justices of ii, 322 |
| Eglinton, Earl of | Fulton ii, 33 |
| Eglinton, Earl of, and Curators | Tenants ii, 453 |
| Eiston | Eiston i, 128 |
| Elder | Allan ii, 609 |
| Elgin, Earl of | Ferguson i, 166 |
| Elgin, Earl of | Tweeddale, Marquis of ii, 88 |
| Elgin, Earl of | Walls i, 242, 139, 348, 518; ii, 88, 447 |
| Elgin, Earl of | Wallwood i, 469; ii, 287 |
| Elibank, Lord | Hay ii, 126 |
| Elibank, Lord | M'Kenzie i, 274 |
| Elibank, Lord, and others | Pentland i, 92 |
| Elibank, Lord and Trustees | Hamilton i, 117, 118 |
| Elliot | Buccleuch, Duke of i, 205, 261; ii, 601 |
| Elliot | Currie i, 112, 118 |
| Elliot | Elliot i, 108, 112 |
| Elliot | Pott i, 90, 103, 104, 105, 106, 108; ii, 527 |
| Elliot's Case | Elliot i, 82 |
| Elliot's Trustees | Elliot i, 191; ii, 236, 333, 334 |
| Elrick's Trustees | Duff ii, 479 |
| Elmalie | Grant and M'Lean ii, 449 |
| Elphinston | Guthrie ii, 18 |
| Elphinston | Leith i, 269 |
| Elphinston, L. of | Leith i, 240 |
| Elwes | Mawe i, 297, 299, 301, 302, 304, 305, 324 |
| Empson | Soden i, 303 |
| Emalie | Duff i, 369, 433 |
| Erroll, Earl of | Ury, Pariaioners of i, 529 |
| Erroll, Lady | Cruikshanks ii, 444 |
| Erskine's Tra. | Crombie ii, 214, 459 |
| Erskine | Glendinning i, 374 |
| Erskine | Kerr i, 339 |
| Erskine | Miller ii, 322 |
| Erskine | Pitcairn i, 75 |
| Erskine, Lord | Stirling, Magistrates of i, 280; ii, 585 |
| Esdailemuir, Minister of, or M'Garroch | Scott ii, 317 |
| Estern | Hamble i, 347 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|------------------------|------------------------------------|-------------|
| Esilmont, Lady | Tenants | ii, 5 |
| Ewing | Chalmers and Collins | ii, 534 |
| Ewing | Crawford | ii, 221 |
| Ewing | Stirling, Road Trustees of | ii, 322 |

F

| | | |
|---------------------------------------|---|------------------|
| Fairfax and others | Greenshields | ii, 507, 557 |
| Fairholme | Livingston | ii, 465 |
| Fairlie | Gibson | i, 159 |
| Fairlie | Johnston | ii, 386 |
| Fairlie | Nelson and Fulton | ii, 597 |
| Falconer | Hay | i, 196, 222, 248 |
| Falconer | Jamieson | ii, 12 |
| Falconer | Smith | ii, 75 |
| Falconer | Thomson | i, 171 |
| Faldenside, L. of | Bemerside, L. of | ii, 13, 46 |
| Falkinton | Cress | i, 236 |
| Farquhar | Campbell | i, 208; ii, 113 |
| Farquharson | Farquherson | i, 99 |
| Farrant | Thomson | i, 306 |
| Featherstonehaugh | Fenwick | i, 216 |
| Fenton | Grant | ii, 156, 157 |
| Fenton | Mathertie, Tenants of | ii, 200 |
| Ferguson | Dick | ii, 609 |
| Ferguson | Ferguson i, 123, 127, 128, 230, 273, 275; | ii, 165 |
| Ferguson | Galloway | ii, 512 |
| Ferguson | Glasgow, Magistrates of | i, 342, 343 |
| Ferguson | Harvey | ii, 352 |
| Ferguson | M'Candlish | ii, 302 |
| Ferguson | M'Dowal and others | i, 341 |
| Ferguson | Macdowall | i, 341 |
| Ferguson | M'Nidder | ii, 209 |
| Ferguson | Morrison | ii, 8 |
| Ferguson | Muir | ii, 449, 463 |
| Fernie | Mitchell | i, 331 |
| Ferres | Ferres | i, 82 |
| Ferrier | Hector | ii, 615 |
| Fife, Earl of | Fife, Trustees of the Earl of | i, 81 |
| Fife, Earl of | Gordon | i, 280 |
| Fife, Earl of | King | i, 262 |
| Fife, Trustees of the Earl of | Duncan | i, 375 |
| Fife, Trustees of the Earl of | Wilson | i, 99, 248, 454 |
| Fife, Earl of | Wilson | i, 237, 279 |
| Findoury | Brechin, Town of | i, 143 |
| Finlay | Forbes | ii, 74 |
| Finlayson | Finlayson | i, 176, 177, 187 |
| Finlayson | Kidd | i, 186 |
| Finlayson | Monro | i, 91; ii, 236 |
| Finlayson | Peddie | ii, 422 |
| Finlayson and Weir | Clayton | ii, 142 |
| Finnie | G. & S. W. Ry Co. | i, 358 |
| Finnie | Mitchell or Trotter | i, 323; ii, 493 |
| Fisher | Dickson | i, 296 |
| Fisher | Turnbull | ii, 122 |
| Fitzherbert | Shaw | i, 301 |
| Fleming | Baird | ii, 454 |
| Fleming | Ure | ii, 556, 557 |
| Flemings | Flemings | i, 227 |
| Flemings | Morrison | ii, 95 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|---|-----------------------------------|
| Flemings | Macdonald | ii, 563 |
| Fletcher (of Aberlady) | | ii, 440 |
| Fletcher | Fletcher's Trustees | ii, 232 |
| Flak, Parson of | Parochinera | i, 474 |
| Flockhart | Kirksession of Aberdour | i, 145 |
| Flowerdew | Buchan | ii, 346 |
| Foley | Addenbrooke | i, 308 |
| Forbes, Petitioner | | i, 179, 186 |
| Forbes | Anderson | i, 33 |
| Forbes | Buchan | i, 129; ii, 13 |
| Forbes | Duncan | ii, 134, 603 |
| Forbes | Forbes | ii, 29 |
| Forbes | Inverness, Magistrates of | i, 264, 265 |
| Forbes | Inverness, Town of | i, 261 |
| Forbes | Leys, Masson, & Co. | i, 382 |
| Forbes | Milne and others | ii, 111 |
| Forbes | Saltoun's Executors, Lady | ii, 160 |
| Forbes | Smith | i, 283 |
| Forbes | Ure | ii, 145 |
| Forbes | Walker | i, 259, 263 |
| Forbes | Wilson | i, 110, 369, 373, 374, 438 |
| Forbes and another | West and Her Majesty's Advocate | i, 147 |
| Ford | Hillor | ii, 473 |
| Fordel, L. of | Freuchy, Tenants of | i, 260 |
| Fordyce | Brydges | ii, 337 |
| Forfar, Magistrates of, and Potter | Malcolm | i, 265 |
| Forman, Tutors of, Petitioners | | ii, 113 |
| Forrester | A | ii, 613 |
| Forrester | Milligan | i, 206, 212, 213 |
| Forrester | Thomson | ii, 487 |
| Forrester | Wright | ii, 492, 494 |
| Forrester's Executor | Dreddon, L. | ii, 444 |
| Forster and Duncan | Adamson | ii, 455 |
| Forsyth | Aird and others | ii, 573 |
| Forsyth | Bruce | i, 526; ii, 50, 55 |
| Fotheringham, L. | Balmerino | ii, 613 |
| Fowler | Cant | ii, 359, 410 |
| Fowles | M'Lean | i, 365, 369, 370, 441 |
| Fowles | | ii, 47 |
| Fowles | Innertyle, Tenants of | i, 164 |
| Fowles | M'Whirter | ii, 152, 507 |
| Fraser, petitioner | | i, 186 |
| Fraser, petitioner | | i, 173, 174 |
| Fraser, petitioner | | ii, 196 |
| Fraser | Abercorn, M. of | ii, 129, 562, 603 |
| Fraser | Brebner | i, 441 |
| Fraser | Duff | i, 280 |
| Fraser | Ewart | ii, 152, 449 |
| Fraser | Fraser | i, 84, 224, 226, 515; ii, 91, 247 |
| Fraser, A. | Fraser | ii, 233 |
| Fraser, C. | Fraser | ii, 233 |
| Fraser | Hogg | ii, 571 |
| Fraser | Lealie | i, 362, 364, 366 |
| Fraser | Loval, L. | i, 186 |
| Fraser | Mathieson | ii, 183 |
| Fraser | Mackay | ii, 228 |
| Fraser | M'Donald and Jackson | ii, 526 |
| Fraser | Maitland | ii, 138, 249, 252, 253, 266, 490 |
| Fraser | Middleton | i, 120 |
| Fraser | Pitaligo, L. | i, 457, 459 |
| Fraser and Tait | Union Canal Co. and Sir T. Carmichael | ii, 202 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|----------------------------------|---------------------------------|-------------------|
| Freeland | Monteith | ii, 39 |
| Frederick | Maitland & Cunningham | ii, 569 |
| Freendraught, Viscount | Seyton | ii, 85 |
| Frier | Haddington, E. of | ii, 214, 243, 248 |
| Fullarton | Crawford and others | ii, 481, 483 |
| Fullarton | Richmond | i, 135 |
| Futt | Ruthven, Lord | ii, 463 |

G

| | | |
|--|------------------------------------|-------------------------|
| Gachen | Walkinshaw | i, 464 |
| Gage | Newmarket Railway Co. | i, 349 |
| Gairden | Watson | i, 280 |
| Gairlies, Lord | Stewart | i, 463 |
| Gaitmilk, Feuars of | Dunfermline, Feuars of | i, 269 |
| Galashiels, L. of | Mackerston, L. of | ii, 41 |
| Galbraith's Tra. | Eglington Iron Works | i, 397, 514 |
| Gall and others | Muirkirk Iron Co. | i, 277 |
| Galloway | M'Pherson | ii, 437 |
| Galloway | Robertson & Co. | ii, 156 |
| Galloway | Nicholson | ii, 313 |
| Galloway, Bishop of | Innes | i, 471 |
| Galloway, Countess of | M'Kenzie | i, 195 |
| Galloway, E. of | Dalry, Minister of | i, 144 |
| Galloway, E. of | M'Culloch | i, 520 |
| Galloway, E. of | M'Hutcheon | i, 235; ii, 537 |
| Galloway, E. of | Tailzifer | i, 163; ii, 194 |
| Galloway, E. of | Tenants | i, 486 |
| Galloway, E. of | Wigton, Burgesses of | i, 152, 487; ii, 123 |
| Galloway, E. of, and others, petitioners | | i, 183 |
| Galloway, Sheriff of | Craigcassie, L. of | ii, 14 |
| Gammel | Low | ii, 173 |
| Gammel | Yule | i, 164 |
| Gammel and Davidson | Anderson | i, 420; ii, 239, 248 |
| Gammel's Trustees | Miller, | ii, 496 |
| Garden | A | ii, 577 |
| Garden | Gregory | ii, 159 |
| Garden | Lindsay | ii, 345, 438 |
| Gardner and Steel | Montgomery | ii, 468, 469 |
| Gardner | Walker and Donald | ii, 275 |
| Garroch | Forbes | i, 448 |
| Gasten, Vicar of | Valentina | i, 71 |
| Gatherer | Cumming | ii, 487, 488 |
| Gemmill | Riddell, &c. | i, 278; ii, 212 |
| Gentle | Harvey | i, 455, 459; ii, 20, 21 |
| Gibb | Winning | ii, 469 |
| Gibson | Aitken | i, 163 |
| Gibson | Corebie, L. of | ii, 610 |
| Gibson | May and Husband | ii, 395, 620 |
| Gibson | Moffat | ii, 242 |
| Gibson | Soon | i, 164 |
| Gibson | Scott | ii, 93 |
| Gilchrist and others | Kinghorn, Magistrates of | i, 150 |
| Gill | Fife's Trustees, Earl of | i, 360; ii, 467 |
| Gill | Winning | i, 275 |
| Gillanders | Craig | ii, 501 |
| Gillespie | Clark | i, 170, 216 |
| Gillespie and Husband | Russel and Son | i, 270, 397 |
| Gillies | M'Donald | ii, 208, 210 |
| Gillon | Alexander | ii, 241 |
| Gillon | Muirhead | i, 206, 213 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|--|--|
| Gilmour | Mutter | ii, 464 |
| Gilmour | Stewart's Reps. | ii, 464 |
| Girdwood & Co. | Campbell | i, 343 |
| Girdwood & Co. | Pollock, Gilmour, & Co., and Wilson and Son | ii, 381 |
| Girdwood & Co. | Wilson and others | i, 321, 434; ii, 381 |
| Glasgow, Barrhead, and Neilston Direct Railway Co. | Nitabill Coal Co. | ii, 569 |
| Glasgow, Barrhead, and Neilston Railway Co. | Caledonian Railway Co. | i, 354, 387 |
| Glasgow, Earl of | Hamilton and Dunlop | i, 238 |
| Glasgow, Earl of, and Wilson | Hurlet and Campsie Alum Co. | ii, 518 |
| Glasgow Fishers | Glasgow, Magistrates of | i, 342 |
| Glasgow, Garnkirk, and Coatbridge Railway Co. | Caledonian Railway Co. | i, 357 |
| Glasgow, Magistrates of | Aitchison | ii, 560 |
| Glasgow, Magistrates of | Bains | i, 150 |
| Glasgow, Magistrates of | M'Fait | i, 373 |
| Glasgow, Maltmen of | Tennent | i, 157 |
| Glasgow, University of | Glasgow, Surgeons of | i, 139 |
| Glasgow, Wrights of | Cross | i, 157 |
| Glen | M'Kenzie | ii, 138 |
| Glendinning | Glendinning | ii, 440 |
| Gold | Houldsworth | ii, 501 |
| Goldie | Murray's Tra. | i, 222 |
| Goldie | Oswald and Kennedy | i, 358, 519; ii, 368, 434 |
| Goldie | Williamson | ii, 469 |
| Gooden or Chisholm | Chisholm | i, 126; ii, 332 |
| Goodsir | Wemyss | ii, 412 |
| Goodtitle and Eastwick | Way | i, 414 |
| Gorbals, Procurator-Fiscal of | M'Arthur | i, 155 |
| Gordon | Anderson | i, 416, 417, 418, 419, 420; ii, 492 |
| Gordon | Bryden | ii, 29, 30, 31 |
| Gordon | Burnett | i, 385; ii, 59, 75 |
| Gordon | Copland | ii, 134, 603 |
| Gordon | Crawford | i, 237, 244; ii, 473 |
| Gordon | Falconer | ii, 479 |
| Gordon | Fidler | ii, 492 |
| Gordon | Forbes, Lord | i, 344, 366, 454 |
| Gordon | Gordon | i, 103, 110, 119, 123, 315; ii, 334 |
| Gordon | Gordon, Duke of | ii, 44 |
| Gordon | Graham | ii, 348, 394 |
| Gordon | Hall | i, 87, 423 |
| Gordon | Hope | ii, 100 |
| Gordon | Learmonth | ii, 45 |
| Gordon | Michie's Repres. | ii, 81 |
| Gordon | M'Culloch | i, 487; ii, 481 |
| Gordon | Milne | i, 87, 88; ii, 575 |
| Gordon | Robertson and others | i, 384, 419; ii, 240, 487, 492 |
| Gordon | Ruxton | ii, 184, 266 |
| Gordon | Thomson and others | i, 420; ii, 240, 251 |
| Gordon | Suttie | ii, 422, 424, 435, 461, 512 |
| Gordon Cumming | Gordon | i, 105, 106 |
| Gordon and M'Donald | Fife, E. of | ii, 128, 614 |
| Gordon, Duke of | Innes | ii, 233, 528 |
| Gordon, Duke of | Leslie and others | ii, 169 |
| Gordon, D. of, and Gordon Cumming | Carmichael | i, 433, 441, 449 |

| <i>Petitors.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|------------------------------------|---|---|
| Gordon's Trustees | Melrose | ii, 255, 536 |
| Gordon's Trustees | Williamson | ii, 280 |
| Gordon's Trustees, Duke of | Innes | ii, 250, 528 |
| Gosford, Lord | Tenants | ii, 129 |
| Goskirk | Edin. Ry. Station Access Co. . | ii, 185, 541 |
| Govan | Lang | ii, 602 |
| Gowan | Purcell | i, 164 |
| Gowans | Carstairs | i, 369, 371, 439 |
| Gowans | Christie | ii, 454 |
| Gower | Mackay and Clelland | i, 440 |
| Graine | Whytock | i, 472 |
| Graham | Gordon | i, 413; ii, 41, 95, 96, 248, 394 |
| Graham | Gowans | i, 431 |
| Graham | Jolly | ii, 223, 243, 252, 253 |
| Graham | Lamont | i, 312, 321 |
| Graham | Lindsay | ii, 538 |
| Graham | M'Kenzie | ii, 211, 546 |
| Graham | Stratton | ii, 497 |
| Graham | Writers to the Signet, Office-bearers . | i, 157 |
| Graham and Black | Stevenson | i, 245; ii, 472, 534 |
| Grainger | Geils | i, 380; ii, 77, 120, 480 |
| Grainger | Hamilton | ii, 48 |
| Grainger | Hamilton, Duke of | ii, 545 |
| Grange, L. of Durham | Grange, Lady, of Durham | i, 474 |
| Grant | Adamson | i, 496, 501, 502, 504, 521 |
| Grant | Baird | ii, 249 |
| Grant | Brace, Lord | i, 238; ii, 170 |
| Grant | Dundas | ii, 527 |
| Grant | Gentle | ii, 506 |
| Grant | Grant | i, 412, 432; ii, 53 |
| Grant | Milne | ii, 198 |
| Grant | M'Donald and Grant | ii, 153, 158, 162 |
| Grant | M'Lean | ii, 446 |
| Grant | M'Leod | ii, 248 |
| Grant | Richardson | i, 432 |
| Grant | Rose | i, 278 |
| Grant | Sherrie | ii, 416 |
| Grant | Sinclair | i, 372; ii, 119 |
| Grant | Walker, Grant, & Co. | i, 409 |
| Grant | Watt | i, 375; ii, 469 |
| Gray | Arbroath, Guildry of | i, 167 |
| Gray | Brown | ii, 571 |
| Gray | Goldie | ii, 484 |
| Gray | Graham | ii, 611 |
| Gray | Hogg | ii, 453 |
| Gray | Lowe, &c. | i, 228, 230, 235, 254, 273; ii, 98, 145 |
| Gray | Reid | ii, 444 |
| Gray | Ranton | ii, 267, 429 |
| Gray | Rollock | i, 210, 213 |
| Gray | Seton | i, 127, 273, 275 |
| Gray | Skinner | i, 111 |
| Gray | Sutherland, Earl of | i, 472 |
| Gray | Sword | ii, 257 |
| Gray | Rait | i, 282 |
| Gray and Clark | Syme and Johnston | i, 281, 232 |
| Gray, Lord | Tenants | ii, 69 |
| Gray, Lord | Eastern Counties Railway Co. . | i, 349 |
| Great Northern Railway Co. | Proctor | i, 361 |
| Green | Adamson | ii, 71 |
| Greenlaw | Reid | i, 260 |
| Greig | | |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|------------------------------|-------------------------------|--------------------------|
| Greig and others | Greig and others | i, 141 |
| Greig and others | Millar and Normand | i, 147, 149 |
| Greig and Scott | Boyd and Latta | i, 366, 452, 455; ii, 93 |
| Greig and Tooh | Mackay | ii, 494 |
| Grierson, petitioner | | ii, 93 |
| Grierson | Gordon | i, 259, 260 |
| Grieve | Cunningham | i, 225, 296, 299, 253 |
| Grieve | Grieve's Creditors | ii, 583, 592 |
| Grieve | Pringle | i, 163, 370, 431, 441 |
| Griffin | Ferrers | i, 82 |
| Groxier | Downie | ii, 12 |
| Grymes | Boweran | i, 297, 309 |
| Guild's Trustees | | i, 128 |
| Gullan | Dunmuir | ii, 610 |
| Guthrie | Annandale, Marquis of | ii, 464 |
| Guthrie | Galloway, Earl of | ii, 611 |
| Guthrie | Guthrie | ii, 611, 613 |
| Guthrie | Mackenzie, L. . . . | ii, 239 |
| Guthrie | Shearer | ii, 286, 462, 472 |

H

| | | |
|------------------------------------|---------------------------------|-------------------|
| Haddington, Earl of | Campbell | ii, 29 |
| Haddington, Earl of | Tenants | ii, 23 |
| Haddington, Magistrates of | Bakers | i, 263 |
| Haddington, Magistrates of | Howden | ii, 161 |
| Haddo | Johnston | ii, 476, 535 |
| Haggard | Miller | ii, 439 |
| Hales, the Master of | Newbottle, The Abbot of | ii, 29 |
| Haining and Douglas | Grierson | ii, 230 |
| Haldane | Rymer and Ramsay | i, 139 |
| Hale | Grant | ii, 134 |
| Haley | Hammerley | i, 307 |
| Haliburton | Blair | ii, 214, 470 |
| Haliburton | Carre, Tenants of | ii, 354 |
| Haliburton | Cunningham | ii, 11 |
| Haliday | Bruce | i, 129; ii, 13 |
| Halkeston | Melville | i, 269, 280 |
| Halkeston, L. . . . | Keddie and Grieve | ii, 391 |
| Halkett | Elgin, Earl of | ii, 613 |
| Halkett, &c., petitioners | | i, 181 |
| Hall | Chandless | i, 415 |
| Hall | Grant | ii, 134, 143, 603 |
| Hall | McGill and others | ii, 241, 255, 536 |
| Hall | Nisbet | ii, 392 |
| Hall | Ross | ii, 455, 550 |
| Hall | Sealwright | i, 361 |
| Hallows, petitioner | | i, 178, 185 |
| Halton | | ii, 85 |
| Halton | Northeast | i, 84 |
| Halton, L. of | Young | i, 490 |
| Haly | Sands | i, 430 |
| Hally | Lang | ii, 99, 103 |
| Hamilton | | ii, 323 |
| Hamilton | Alexander | ii, 345 |
| Hamilton | Borwall | ii, 16 |
| Hamilton | Boyd | ii, 123 |
| Hamilton | Burleigh, Lord | ii, 405 |
| Hamilton | Cardross, Lady | ii, 447 |
| Hamilton | Crawford | ii, 3 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|--|--------------------------------|
| Hamilton | Cunningham | ii, 192, 491 |
| Hamilton | Cathill | ii, 125 |
| Hamilton | Dumb Man in Glasgow | i, 82 |
| Hamilton | Eedale | i, 82 |
| Hamilton | Fleming | ii, 241, 251 |
| Hamilton | Hamilton | ii, 535 |
| Hamilton | Hamilton, Executors of | ii, 325 |
| Hamilton | Harper | ii, 84 |
| Hamilton | Harvey | ii, 11 |
| Hamilton | Liberton, Tenants of | ii, 111 |
| Hamilton | McCartney | ii, 449 |
| Hamilton | McDowall | i, 90, 105 |
| Hamilton | Oxford, Viscountess of | i, 121 |
| Hamilton | Queensberry's Executors, Duke of | i, 443 |
| Hamilton | Reid's Trustees | ii, 486 |
| Hamilton | Sharpe | i, 169 |
| Hamilton | Smith | i, 428 |
| Hamilton | Somerville and Menzies | i, 255 |
| Hamilton | Tenants | i, 487, 489, 486; ii, 138, 611 |
| Hamilton | Tennent and Co. | ii, 350, 557 |
| Hamilton | Turner | ii, 518, 540 |
| Hamilton | Wallace | ii, 18 |
| Hamilton and Arthur | Dunn | ii, 559, 535 |
| Hamilton, Duchess Dowager of | Hamilton, Duke of | i, 127 |
| Hamilton, Duke of | Hamilton, Duchess Dowager of | i, 273, 274 |
| Hamilton, Duke of | Waring Scott | i, 117, 118 |
| Hamilton, Duke of | Warnocks | ii, 134 |
| Hamilton, Executors of | Hamilton | ii, 325, 502 |
| Hamilton, Marquis of | A | ii, 223, 457, 571 |
| Hamilton's Trustee | Stewart | i, 507 |
| Hamilton's Trustees | Fleming | ii, 261, 262 |
| Hanson | Stevenson | ii, 600 |
| Hard | Anstruther | ii, 241 |
| Hardie | Black | ii, 223, 258 |
| Hardie | Kinloch | ii, 183, 183 |
| Hardie | Kirkcassion of Linlithgow, | i, 145 |
| Hardie | Wilson | ii, 68 |
| Hardie Douglas, and others | Hay's Creditors | i, 502, 522 |
| Hardies | — | i, 464 |
| Hardie's Trustees | Marshall | i, 227 |
| Harestanee | Tenants | ii, 69 |
| Harker | Birkbeck | i, 414 |
| Harper | Armour | ii, 194 |
| Harper | Laing | ii, 425 |
| Harris | Dundee, Mags. of | i, 261, 264, 268 |
| Harrold | Pollexfen | i, 367; ii, 220 |
| Harrower | Wells | i, 377 |
| Hart | Tenants | ii, 43 |
| Harvey | Aberdeen, King's College of | ii, 483 |
| Harvey | Gordon | i, 86 |
| Harvey | Haldane and Others | ii, 581 |
| Hatton | Clay | i, 244, 255 |
| Hatton | Murray | i, 193 |
| Hawkes | Eastern Railway Company | i, 349 |
| Hay | Bandone | ii, 24 |
| Hay | Douglas | i, 456 |
| Hay | Elliot | ii, 359, 396, 399 |
| Hay | Gight | ii, 354 |
| Hay | Grant | i, 86 |
| Hay | Keith, ii, 379, 359, 370, 386, 391, 392, 401 | |
| Hay | Kerr | ii, 197 |
| Hay | Kerse | ii, 48, 55 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|--|--|
| Hay | M'Crackan | i, 473 |
| Hay | Moffat | ii, 141 |
| Hay | Strachan | ii, 611 |
| Hay and Wood, petitioners | | i, 236, 234, 250 |
| Heap | Barton | i, 324 |
| Heddle | Baikie | ii, 29, 443 |
| Heddrington | Book and Dod | i, 189 |
| Hellawell | Eastwood | i, 306 |
| Henderson, petitioner | | i, 175, 176; ii, 527 |
| Henderson | Henderson, | ii, 292 |
| Henderson | Southhouse, L. of | ii, 11 |
| Henderson | Warden and Others | ii, 367, 372, 373, 418 |
| Henderson and Thomson | Stewart | i, 571; ii, 559, 566 |
| Henry | M'Ewan | ii, 289, 299 |
| Hepburn | Burn | i, 222, 248, 251 |
| Hepburn of Humbie | Keith, Heritors of, and Humble | i, 136 |
| Hepburn | Layning | ii, 610 |
| Hepburn | Mossman | ii, 584 |
| Hepburn | Nisbet | ii, 141 |
| Hepburn | Richardson | ii, 371, 387 |
| Heriot | Faulds | ii, 612 |
| Heriot | Halkett | ii, 288, 494 |
| Heriot's Hospital | Alves | i, 282 |
| Heriot's Hospital | Angus | ii, 468, 460 |
| Heriot's Hospital | Heriot's Garden, Gardeners of | ii, 473 |
| Hermischels or Stevenson | Stevenson | ii, 18 |
| Hermiston, L. of | Butler's Relict | i, 476 |
| Heron | Rollo | ii, 26, 31, 36 |
| Heron, L. of | | ii, 351 |
| Herries and Cunninghame | Lindsay | ii, 13 |
| Herries | Maxwell, Curator | ii, 331, 341 |
| Hewitt | Cassillis, Earl of | i, 76 |
| Highland Railway Co. | Kinclaven, Hera. of | ii, 318 |
| Hill, petitioner | | i, 182 |
| Hill | Edinburgh, Magistrates of | i, 242 |
| Hill | Wright | i, 531; ii, 571 |
| Hill and others | Gordon | ii, 283 |
| Hileid | Lindsay | i, 214 |
| Hishop and Duke of Queensberry's Executors | Buccleuch, Duke of | i, 93 |
| Hishop | Duke of Queensberry's Execu- tors | ii, 267, 268, 270 |
| Hodge | Brown | i, 311; ii, 175, 218, 222 223, 447, 449 |
| Hood and Spouse | Martin's Creditors | ii, 365 |
| Hogg | Morton | ii, 134, 143 |
| Hogg | Low | ii, 467 |
| Holborn | Maynes | ii, 440 |
| Holdsworth | Porter | ii, 584, 621 |
| Holiday | Scott and others | ii, 274, 459 |
| Holmes | Eastern Railway Company | i, 345 |
| Home, petitioner | | i, 176, 178 |
| Home | — | ii, 364 |
| Home | Anderson | ii, 445 |
| Home | Cairncross | ii, 438 |
| Home | Corrour | ii, 447 |
| Home | Home | ii, 105, 196 |
| Home | Kello, Tenants of | ii, 438 |
| Home | Oldhamstocks, Tenants of | i, 85, 445, 459 |
| Home | Purvis | i, 411 |
| Home | Taylor | i, 205, 206; ii, 447 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|--|--------------------------------|
| Honeyman | Gordons | ii, 127 |
| Hood | Miller | ii, 508 |
| Hope, petitioner | ii, 300 | |
| Hope | Craighall, Minister of | i, 72 |
| Hope and M'Cann | Waugh | ii, 245 |
| Hopetoun | Hunter's Trustees | ii, 206 |
| Hopetoun, Earl of | Bathgate, Brewers of | i, 264 |
| Hopetoun, Earl of | Borron and Scots Mines Co. | ii, 524 |
| Hopetoun, Earl of | Low | ii, 141 |
| Hopkirk, Earl of | Wight | i, 332; ii, 190, 205, 481 |
| Hopkirk | Kelly and Robertson | ii, 112 |
| Horne | M'Lean | ii, 133, 135, 387 |
| Horseburgh | Morton and others | ii, 391, 419 |
| Houldsworth | Brand's Trustees | ii, 116 |
| Houston | Harvie | ii, 460 |
| Howden and Others | Haddington, Earl of | ii, 224 |
| Hoy, petitioner | ii, 74 | |
| Hubbard | Johnson | i, 413 |
| Humbie, Executors of | Humbie, Minister of | i, 136 |
| Hume | Craw | i, 109, 241 |
| Hume | Dickson | i, 428 |
| Hume | Fish | i, 208 |
| Hume | Hume | ii, 63 |
| Hume | Johnston | i, 234 |
| Hume | Lyall | i, 236 |
| Hume | M'Allister | i, 275 |
| Hume | M'Leod's Representatives | i, 528; ii, 151 |
| Hume | Scott | ii, 194 |
| Hume and others | Macalister | i, 275 |
| Hunter | Badenoch | ii, 129 |
| Hunter | Broadwood | ii, 499 |
| Hunter | Brown | i, 226 |
| Hunter | Clark | ii, 497 |
| Hunter | Crichton | i, 70 |
| Hunter | Dunn | ii, 92 |
| Hunter | Galliers | i, 226 |
| Hunter | Hardie | ii, 10 |
| Hunter | Kinnaird's Trustee | ii, 443, 446 |
| Hunter | Stewart | ii, 344 |
| Hunter | Napier | i, 242 |
| Hunter | North British Railway Co. | i, 252; ii, 471, 551 |
| Hunter | North of England Banking Co. | ii, 389 |
| Hunter | Queensberry's Executors, Duke of | ii, 552 |
| Hunter | Miller | ii, 486, 491 |
| Huntly | Hume | ii, 345 |
| Huntly, Marquis of | Grant | i, 85, 446 |
| Harlet and Campsie Alum Company | Glasgow, E. of, and Wilson & Son, ii, 517 | |
| Hutchison and Lorimer | Queensberry's Executors, Duke of | i, 520; ii, 272 |
| Hutchinson | Ferrier or Gordon | i, 368, 408, 410, 457; ii, 353 |
| Hyalop | Hyalop | i, 313 |
| Hyalop and Executors of Duke of Queensberry | Duke of Buccleuch | i, 93 |
| I | | |
| Inglis | Balfour | ii, 472, 473 |
| Inglis | Learmonth's Children | ii, 89 |
| Inglis | Moir's Tutors | ii, 192, 548 |
| Inglis | Tenants | ii, 47 |

INDEX OF CASES CITED.

xlix

| <i>Petitors.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--------------------------------------|---------------------------------------|--|
| Inglis & Co. | Paul | i, 457, 493, 503, 506; ii, 592 |
| Inland Revenue, Officer of | Dunlop and Husband | ii, 308 |
| Innes | Allardice | ii, 90 |
| Innes | Clark | ii, 140 |
| Innes | Gordon, Duke of | i, 104, 105, 107, 109; ii, 233, 250, 254, 256, 329 |
| Innes | Partridge or Parlinger | i, 336 |
| Innes | Peterborough, Lord | ii, 549 |
| Inverury, Burgesses of | Inverury, Mags. of | i, 140, 150, 157 |
| Irvine | Aberdeen College, Factor of | ii, 610 |
| Irvine | Cliffe | ii, 582 |
| Irvine | Collins | i, 427 |
| Irvine | Greitney, L. | ii, 197 |
| Irvine | Lyon | i, 231 |
| Irvine | Scott | ii, 255 |
| Irvine | Thoms or Fiddes | i, 238 |
| Iales, Bishop of the | M'Lean | i, 76 |
| Iales, Bishop of the | Shaw | i, 73, 75 |
| Iales, Bishop of the | Stuart of Asog | i, 73 |

J

| | | |
|------------------------------------|--|----------------------------|
| Jack | Kelly, Earl of | ii, 85 |
| Jack | Muirhead | ii, 18 |
| Jack | Stirling, Town of | i, 150, 152 |
| Jackson | Graham | i, 362, 364, 366, 367, 368 |
| Jackson | Lind | ii, 396 |
| Jackson's Creditors | Easton and Kemble | i, 347 |
| Jaffray | Carrick | ii, 379 |
| Jamieson | Gordon | ii, 127 |
| Jamieson | Houston | i, 166 |
| Jamieson | Thomson | ii, 30, 615 |
| Jamieson and Robb | Thomson | ii, 26, 29 |
| Jenkins | Younger | ii, 261 |
| Jerviswood, L. of | Livingston, L. of | ii, 132 |
| Jevens | Harridge | i, 200 |
| Job | Kerr | ii, 441 |
| Johnamill, Heritors of | Johnamill, Feuars of | i, 287 |
| Johnston | Aberdeen, Dean of Guild of | i, 377 |
| Johnston | Annandale, Marquis of | ii, 329, 333 |
| Johnston | Cleghorn | ii, 449 |
| Johnston | Constable | ii, 554, 556 |
| Johnston | Callen, or Town of Aberdeen | i, 457, 459 |
| Johnston | Dickson | ii, 21, 23 |
| Johnston | Forbes | ii, 496 |
| Johnston | Gordon | ii, 118, 151 |
| Johnston | Howdeny or Howdan, Parishioners of | i, 72 |
| Johnston | Ingis | ii, 282, 301, 449 |
| Johnston | Johnston | ii, 123 |
| Johnston | Logan | i, 362, 364, 366, 369 |
| Johnston | Martin | ii, 16 |
| Johnston | Maxwell's Trustees | ii, 65 |
| Johnston | Monzie | i, 492 |
| Johnstone | Murray | ii, 194 |
| Johnston | Nithsdale, Earl of | ii, 51 |
| Johnston | Thom | ii, 109 |
| Johnston and others | Dobie | i, 310 |
| Johnston and others | Mackie | ii, 244 |
| Johnston's Sequestration | | ii, 601 |
| Johnston's Trustees | | i, 126; ii, 69, 60, 81 |
| Jollie | Stevenson | ii, 85 |

INDEX OF CASES CITED.

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--------------------------------------|--|-----------------------------|
| Jolly | Brown and others | ii, 201 |
| Jolly | Graham | ii, 243, 244, 250, 251, 253 |
| Jones | Noy | i, 191 |
| Jordanhill, Creditors of | Crauford, Earl of | i, 104, 106, 467 |
| Justice | Ross | i, 117 |
| K | | |
| Kay | Milne | i, 131, 129 |
| Kay and Morton | Bell and others | i, 147 |
| Keay | Marquis | i, 88, 90 |
| Keggie | Christie | i, 164, 166 |
| Keir | Hepburn | ii, 613 |
| Keirrie | Ross and Robson | ii, 403 |
| Keith | Johnston's Tenants, | i, 365, 369, 448 |
| Keith | Logie's Heirs | ii, 483, 486, 487, 491 |
| Keith | Ogilvie | i, 475 |
| Keith, Lord | Keith, or Tenants of Peterhead | i, 259, 260, 261 |
| Kelloch | Queensberry's Executors, Duke of | ii, 268, 270 |
| Kelly | Innes | i, 428 |
| Kelly, Earl of | Beaton | ii, 335 |
| Kelso, Feuars of | Roxburghe, Duke of | i, 157 |
| Kennedy | Alison | ii, 141 |
| Kennedy | Carlyle and others | i, 436, 449 ; ii, 112 |
| Kennedy | Corson's Trustees | i, 506 |
| Kennedy | Dalrymple | ii, 444 |
| Kennedy | Graham | ii, 11 |
| Kennedy | Jaffray | ii, 111 |
| Kennedy | Kennedy | i, 65 |
| Kennedy | Mowat | ii, 437 |
| Kerr, petitioner | Downie | i, 180, 186 |
| Kerr | Foulis | i, 363 |
| Kerr | Hunter | ii, 83 |
| Kerr | Ker | ii, 611 |
| Kerr | Muirhead | i, 249 |
| Kerr | Nisbet, Tenants of | ii, 84 |
| Kerr | Ramsay, Lord | ii, 24 |
| Kerr | Redhead | i, 458 |
| Kerr | Thomson | i, 119 |
| Kerr | Turnbull | ii, 288 |
| Kerr | Waugh | ii, 333 |
| Kerr | Woolmet's Children | i, 373, 462, 487 |
| Kerr, L. of | Panton | ii, 671 |
| Keys | Bull | ii, 29 |
| Kidd | Haliburton | i, 82 |
| Kidd | Young | ii, 361 |
| Kilbirnie, Lady | Tenants | i, 147 |
| Kildonan, Creditors of | Douglas, Heron, & Co. | ii, 69 |
| Kilgour | Thomson | ii, 572 |
| Kilmarnock Gas Co. | Smith | ii, 345 |
| Kilmarnock, Magistrates of | Kilmarnock, Inhabitants of | i, 296, 298 |
| Kilmarnock Road Co. | Caledonian Ry. | i, 153 |
| Kincaid, petitioner | Love | ii, 331 |
| Kincaid | Kincardine, Tacksman of | i, 173, 174 |
| Kincardine, Creditors of | Somardike, Heere Van | i, 410 |
| Kincardine, Creditors of | Aberdeen, Burgh of | ii, 406 |
| King, The | Crawford, Earl of | i, 282 |
| King, The | | i, 152, 155, 244 |
| | | i, 68 |

| <i>Petersons.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|------------------------------------|----------------------|
| King, The | Hume | i, 68 |
| King, The | Innes | i, 68 |
| King, The | Moore | ii, 583 |
| King, The | Pedley | ii, 563 |
| King, The | Reid | i, 68 |
| King | Jaffray | ii, 335 |
| King | Topping | i, 307, 323 |
| King | Wieland | ii, 4, 65, 579 |
| Kinghorn | Lamington, L. of | i, 304 |
| Kinghorn Ferry, Trustees of | Orichton and others | i, 341 |
| Kinloch | Maccomie | ii, 139 |
| Kinloch | Mansfield | ii, 119 |
| Kinloch | Robertson | ii, 556 |
| Kinloch | Rochaid | ii, 611 |
| Kinloch and Anderson | Fraser | ii, 266 |
| Kinloch's Executors | Heir, The | ii, 189 |
| Kinnaird | Matthewson | ii, 466 |
| Kinnaird, Lord | Hunter | i, 102, 104 |
| Kinnearl | Menzies | ii, 397 |
| Kinnoull, Earl of | Hunter | i, 280 |
| Kinnoull, Earl of | Keir | i, 283 |
| Kinnoull, Earl of | Richmond | ii, 453 |
| Kinnoull | Tod | ii, 190 |
| Kintore, Earl of, petitioner | Forbes | i, 98 |
| Kintore, Earl of | Watt and Fowler | ii, 91 |
| Kintore, Earl of | Oppenheim | i, 430, 435; ii, 456 |
| Kippen | Gilchrist | ii, 317 |
| Kirk | Kirkaldy, Magistrates of | i, 342; ii, 303 |
| Kirkaldy, Fleshers of | Greig | i, 341 |
| Kirkaldy, Magistrates of | Miller | ii, 609 |
| Kirkland | Caddell | ii, 601 |
| Kirkland and Mandatary | Wilson's Trustees | ii, 598 |
| Kirkman | Pym | i, 86 |
| Kirknewton, Minister of | Balmerino | ii, 111 |
| Knoekdolian, Laird of | Tenants of Parthick | ii, 186 |
| Knowles | Byng and Davidson | ii, 139 |
| Knox | Irvine | i, 88 |
| Knox and Company | Lew | ii, 293, 294, 295 |
| Kochler | Neidrich | i, 86 |
| Kyle | Kerr | i, 84 |
| Kyle | Kyle | i, 84 |

L

| | | |
|----------------------------------|------------------------------|------------------|
| L, Parishioners of | Ker | i, 71 |
| Laidlaw | Wilson | i, 521; ii, 273 |
| Laing | Denny | i, 125 |
| Laing | N | ii, 51 |
| Laing and others, | Stephenson | i, 310; ii, 120 |
| Laird | Grindlay | i, 235; ii, 587 |
| Lambeth | Smith | ii, 56 |
| Lamington | Oswald | ii, 307, 596 |
| Lamington, Lady | Her Son | i, 128 |
| Landale | Meldrum | i, 269, 266, 267 |
| Lang | Hislop | ii, 613 |
| Lang and Cross | Douglas, D. of | i, 127, 273, 274 |
| Langton, Lady | Tenants | i, 424 |
| Lander, Magistrates of | Brown | i, 342 |
| Landerdale, Duke of | Tweeddale, Earl of | ii, 111 |
| Landerdale, Earl of | — | ii, 68, 111 |

| <i>Pursuers.</i> | <i>Defenders.</i> | PAGE |
|--------------------------------------|--|--------------------------|
| Lauderdale, Earl of | Swinton, Tenants of | ii, 439, 442 |
| Laurent | L. Advocate | ii, 542 |
| Laurieston, Lady | Tenants | ii, 52 |
| Law | Beaton | i, 260 |
| Law | Gibson, | i, 375; ii, 469 |
| Laurie | Cunningham | ii, 317 |
| Laurie | Keir or Kerr | i, 352, 362, 369 |
| Laurie | Maxwell | ii, 329 |
| Laurie | Yuille and Lawrie | ii, 406 |
| Lawson | Boghall's Tenants | i, 326, 328 |
| Lawson | Brown | ii, 610 |
| Lawson | Murray | i, 378 |
| Lawson | Ogilvie | ii, 351, 496 |
| Lawson | Scott | ii, 123 |
| Lawson and others | Low | ii, 417 |
| Lawson and others | Maxwell | ii, 408 |
| Lawton | Lawton | i, 291, 305, 308 |
| Lawton | Salmon | i, 297, 305 |
| Leach | Thomas | i, 309 |
| Leck | Fulton and Thomson | ii, 606 |
| Lee | Porteous | ii, 671 |
| Lee | Risdon | i, 524 |
| Lee, L. of | Carstairs, Tenants of | i, 72 |
| Lee, L. of | Siewwright | i, 244; ii, 473 |
| Leechman and Edington | Trail and others | i, 139 |
| Leechman and others | Stuart | i, 448 |
| Leith | Bandovie, L. of | i, 490 |
| Lennox, Duke of | Houston | i, 424; ii, 124 |
| Lennox, Duke of | Forbes | i, 202 |
| Lealie | Grant | i, 202 |
| Lealie | Newabbey, Tenants of | ii, 72 |
| Lealie | Orme | i, 105, 112, 123, 467 |
| Lealie | Stuart | i, 194 |
| Lealie Grant | Dundas | ii, 527 |
| Lealie's Estate, Factor on | Tweedie | ii, 406 |
| Leamore | Hutchison | ii, 112 |
| Ley, L. of | Barr | ii, 354 |
| Ley, L. of | Kirkwood | i, 464, 486; ii, 69, 123 |
| Ley, L. of | Porteous | ii, 46 |
| Levi | Yates | i, 347 |
| Lewars | Haddington and Depute, Earl of | ii, 222 |
| Liddell | Hume | i, 125 |
| Liddell | Kirksession of Bathgate | i, 145 |
| Lidderdale | | i, 210, 213 |
| Lindsay, petitioner | | i, 174 |
| Lindsay | Bell | ii, 469 |
| Lindsay | Bonmitoun | i, 193 |
| Lindsay | Hogg and Nisbet | ii, 606 |
| Lindsay | Hume | ii, 453 |
| Lindsay | Tenants | ii, 69 |
| Lindsay | Webster | i, 375; ii, 470, 581 |
| Lindsay | Wemyss, E. of | ii, 383, 419, 424, 429 |
| Linnlithgow, Maga. of | Edinburgh and Glasgow Rail. Co. | i, 342 |
| Linning's Bailie | Gustard | ii, 326 |
| Liak | Robb | ii, 473 |
| Liak | Scott | ii, 193 |
| Little | Linton | i, 216 |
| Little | Mutter | ii, 497 |
| Livingston, petitioner | | ii, 325 |
| Loch | Tweedie | ii, 502 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|--------------------------------------|--|
| Lochinvar, L. of | Graham | i, 527 |
| Lochinvar, L. of | Stornmonth, Viscount | ii, 55 |
| Lochnaben, Kindly Tenants of | Stirling | i, 426 |
| Lockerby | Bothwell, Tenants of | i, 136 |
| Lockhart | Cathcart | ii, 122 |
| Lockhart | Denham | ii, 216 |
| Lockhart | Lockhart | i, 260 |
| Lockhart | Ogerton | ii, 331 |
| Lockhart | Paterson | ii, 63 |
| Lockhart | Tenants | i, 280; ii, 407 |
| Lockhart | Twaddell | ii, 13 |
| Lockhart | Vassals | ii, 34 |
| Logan | Howatson | i, 265, 266, 267 |
| Logan | Reid | ii, 209 |
| Logan | Tenants | i, 136 |
| Logan | Weir | ii, 63 |
| Logie | Cornie | ii, 98 |
| Logie | Howison | ii, 30 |
| London and North Western Rail. Co. | Scottish Central Railway Co. | ii, 303 |
| Lothian | Somerville | i, 353 |
| Lothian, Marquis of | His Colliers | i, 167 |
| Loudon | Anderson and others | i, 271 |
| Loudon, Lord | Caprington, L. | ii, 538 |
| Loudon and Glasgow, Earls of | Ross | ii, 198 |
| Love | Foster | ii, 345 |
| Low | Knowles | ii, 426, 434 |
| Low | Lyall | ii, 121, 125, 170 |
| Low | Rosebery, Earl of | i, 362, 364, 366, 369 |
| Lowden | Adam | ii, 161 |
| Lowden | Murray | i, 220, 226 |
| Lowndes | Buchanan | i, 81, 88 |
| Lord Treasurer Depute | Dundee, Parson of | ii, 467 |
| Lumsden | Balfour | ii, 11 |
| Lumsden | Lorimer | i, 171 |
| Lumsden | Stewart | i, 131 |
| Lundie | Lundie, The Smith of | i, 452 |
| Lundin | Hamilton | i, 478 |
| Lyall | Cooper | ii, 56 |
| Lyle | Crichton | ii, 487, 491 |
| Lyle | Graham | ii, 486 |
| Lyon | Irvine | ii, 494 |
| Lyon | Reid's Trustees | i, 265, 419; ii, 34, 77, 124, 143, 687 |
| Lyon & Co. | Lizars | i, 498; ii, 546, 584 |

M

| | | |
|----------------------|------------------------------|--------------------|
| M'Alister | M'Alister | i, 230, 275 |
| M'Alister | M'Alister | i, 127, 213, 224 |
| M'Allister | Orr and others | ii, 433 |
| M'Allister | Sprot | ii, 97, 137 |
| M'Arthur | Forbes & Co. | ii, 394 |
| M'Arthur | Miller | ii, 502 |
| M'Arthur | Simpson | i, 449, 452 |
| M'Auley | Rennie | i, 209 |
| M'Ausland | Montgomery | i, 144 |
| M'Braire | Crichton or Murray | ii, 46 |
| M'Braire | Romes | i, 526; ii, 324 |
| M'Callum | Grant | i, 136; ii, 11, 81 |
| M'Callum | Speirs | i, 359 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|------------------------------------|------------------------------------|---------------------------|
| Macao | State, Officers of | i, 201 |
| Maccaro | — | i, 491 |
| M'Christie | Kee or Fisher | ii, 12, 127, 139, 140 |
| M'Clellan | Graham | ii, 428 |
| M'Clellan | Kerr and Irvine | ii, 223, 259 |
| M'Clymonta | Cathcart | i, 257; ii, 278, 279 |
| M'Coag | M'Sporan | i, 250 |
| Maccome | Dickson | ii, 321 |
| M'Crae | Gordon | ii, 451 |
| M'Crae | Hyndman and others | i, 85 |
| M'Crae | M'Kenzie's Trustees | ii, 68 |
| M'Crae | M'Pherson and others | ii, 257, 282 |
| M'Crae and others | Smith | ii, 283 |
| M'Cris | Collier | ii, 646 |
| M'Cris | Lothian | ii, 621 |
| M'Culloch | — | ii, 11 |
| M'Culloch | Grierson | ii, 491 |
| M'Donald | Cameron and others | ii, 186, 422 |
| M'Donald | Dempster | ii, 194, 202 |
| M'Donald | Jardine | ii, 130 |
| M'Donald | M'Donald | i, 402, 408; ii, 53, 63 |
| M'Donald | M'Donald's Trustees | ii, 611 |
| M'Donald | Mathieson | ii, 640 |
| M'Donald | Philp and Barr | i, 339 |
| M'Donald | Robertson's Trustees | ii, 255 |
| M'Donald | Sinclair and others | ii, 45 |
| M'Donald, Young, & Co. | Hamilton | ii, 267 |
| M'Donnell | Cameron | ii, 433 |
| M'Dougall | Campbell | ii, 112 |
| M'Dougall | Buchanan | ii, 369, 471 |
| M'Dougall and Herbertson | Northern Assurance Co. | ii, 161 |
| Meadowal | Caird | i, 412 |
| M'Dowal | Jamieson | ii, 363, 394 |
| M'Dowal | M'Culloch | i, 259, 267 |
| M'Dowal | M'Dowal | i, 481; ii, 227 |
| M'Dowal | Glasgow, Magistrates of | i, 149, 150, 153 |
| M'Ewan | Donald | ii, 156, 158 |
| M'Ewan | Paterson | ii, 487 |
| M'Farlane | Forrester | ii, 428 |
| M'Farlane | Greig | ii, 622 |
| M'Farlane | Grieve | i, 428 |
| M'Farlane and others | Campbell | ii, 675 |
| M'Feggan | Murray | ii, 168 |
| M'Garroch | Scott | ii, 317 |
| M'Ghie | Mather | ii, 394 |
| M'Ghie and others | Edinr., Mags. of | i, 149, 150, 152 |
| Macgibbon | Macgibbon | i, 170 |
| M'Gill | Crauford | ii, 437 |
| M'Gill | Ferrier and others | ii, 349, 689 |
| M'Gill | Law | i, 117 |
| M'Glashan | Athole, Duke of | ii, 407, 408, 424 |
| M'Gregor, petitioner | — | i, 186; ii, 114, 468, 479 |
| M'Gregor | Dover and Deal Railway Co. | i, 349 |
| M'Gregor | Hunter | ii, 173, 396, 699 |
| M'Gregor | Strathallan | ii, 100 |
| M'Gregor | Stevenson | ii, 668 |
| M'Gregor | Wright | ii, 631 |
| M'Guffock and others | Agnew | i, 237 |
| M'Harg, petitioner | — | ii, 54, 55 |
| M'Ireavie | Smith | ii, 22 |
| Macintosh | Fraser | i, 169 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|--------------------------------------|----------------------------|
| Macintosh | M'Donald | ii, 601 |
| Macintosh | Macintosh | ii, 353, 606 |
| Macintosh | Munro | ii, 16, 17 |
| Macintosh | Ogilvie's Trustees | ii, 239 |
| Macintosh | Playfair's Trustees | ii, 300 |
| Macintosh | Robertson | ii, 94, 567 |
| Macintosh | Watt | ii, 98 |
| M'Intyre's Representatives | M'Nab's Trustees | i, 525, 527; ii, 545 |
| Mack | Allan and Simpson | ii, 560 |
| Mack | Dumbreck | ii, 490 |
| Mackay, petitioner | | i, 182 |
| Mackay | Brodie | ii, 218, 240 |
| Mackay | Ross-shire, Justices of | ii, 322 |
| M'Kechnie | Montrose, Duke of | ii, 426, 429 |
| M'Kenzie, petitioner | | i, 181, 186 |
| M'Kenzie | Craigie | ii, 500 |
| M'Kenzie | Crichton and Hay | ii, 371, 373 |
| M'Kenzie | Forbes' Trustee | i, 282 |
| M'Kenzie | Fraser | ii, 158 |
| M'Kenzie | Gilchrist | ii, 497, 500 |
| M'Kenzie | Gillanders and M'Pherson | ii, 17, 24, 101 |
| M'Kenzie | Gullan and others | i, 424, 426, 483 |
| M'Kenzie | Houston | i, 281 |
| M'Kenzie | Kennedy | ii, 459 |
| M'Kenzie | Learmonth | i, 253 |
| M'Kenzie | M'Kenzie | i, 123, 273 |
| M'Kenzie | M'Kenzie | ii, 64, 231 |
| M'Kenzie | M'Leod | ii, 259 |
| M'Kenzie | Rose | i, 286 |
| M'Kenzie | Sutherland | ii, 194 |
| M'Kenzie and Mandatory | Crawford | i, 413 |
| M'Kenzie and Munro | Horne | i, 282 |
| M'Kenzie and others | Renton | i, 282 |
| M'Kenzie and Tutors | M'Kenzie | i, 443 |
| M'Kenzie and Wyllie | Trotter | i, 365, 370 |
| M'Kenzie, or Morrison and others, petitioners | | i, 183 |
| Mackie | Nabony | ii, 124, 369 |
| Mackie | Niell | i, 136 |
| M'Laren | Breadalbans, Marquis of | i, 410; ii, 26, 31, 37, 38 |
| M'Laren | Clyde Trs. | ii, 306, 314, 318 |
| M'Lauchlan | M'Lauchlan | i, 94 |
| M'Lean, petitioner | | i, 185, 186 |
| M'Lean | Cameron | i, 437 |
| M'Lean | M'Lean | i, 482 |
| M'Lellan | Graham | ii, 420 |
| M'Leod | Bruce Crawford | ii, 438 |
| M'Leod | M'Kenzie | ii, 168 |
| M'Leod | M'Leod | ii, 429, 532 |
| M'Leod | Muiravonside, Vassals of | i, 264 |
| M'Leod | Ross | ii, 571 |
| M'Leod | Urquhart | i, 378 |
| M'Leod and others | Thomson's Creditors | ii, 390, 432 |
| M'Leod, Lord | Ross | i, 260 |
| M'Martin | Forbes | ii, 348 |
| M'Master | Cameron | ii, 246 |
| Macmath | Hewitt | ii, 15 |
| M'Michan | Hutcheson | ii, 423 |
| M'Millan | Gordon | i, 458 |
| M'Moran | Black | i, 432 |
| M'Nab | Commrs. of Annexed Estates | ii, 75 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|--------------------------------------|--------------------------------|
| M'Nab and others | Martin and others | i, 149 |
| M'Nair | Blantyre's Tutors, Lord | ii, 27, 32, 54, 67, 93 |
| M'Naught | Graham | i, 409 |
| M'Naughton | Wilson | ii, 48, 55, 75 |
| M'Neill | Blair | ii, 89 |
| M'Neill | M'Neill | i, 170 |
| M'Neill | Sinclair | ii, 256 |
| M'Niven | Leith and Gray | i, 409 |
| M'Niven | Murray | i, 88 |
| M'Phadrick | M'Lauchlan | ii, 197 |
| M'Phail | Sutherland | i, 584 |
| M'Pherson | Grant | ii, 307 |
| M'Pherson | M'Pherson | i, 333, 334 |
| M'Pherson | M'Pherson | i, 431 |
| Macqueen | Fraser | ii, 158 |
| Macra | M'Kenzie | i, 490; ii, 251, 252, 253 |
| M'Raith | Kennedy | ii, 448 |
| M'Rorie | M'Whirter and Gray | i, 370, 371, 441 |
| M'Tavish | Fraser's Trustees | ii, 240 |
| M'Tavish, or Factor of Anchinbreck | M'Lauchlan | i, 373, 465, 480, 482; ii, 537 |
| M'Tavish | Scott and others | ii, 358 |
| M'Whannel | Dobie | i, 217 |
| Macvean | Macvean | i, 211 |
| Madder | Tarras, Lord | i, 249 |
| Madderty, Minister of | Madderty, Heritors of | i, 136 |
| Mayan | Slaughter | i, 236 |
| Mailler | Readdle | ii, 251 |
| Main | March | ii, 29 |
| Maitland | Leslie | ii, 263 |
| Maitland | Nelson | i, 428 |
| Malcolm | Bardner | i, 108, 109; ii, 447 |
| Malcolm | Henderson | i, 108; ii, 256 |
| Malcolm | Rutherford | i, 263 |
| Malcolms | Young | ii, 582 |
| Mansfield, Earl of | Aitchison | ii, 544 |
| Mansfield, Earl of | Blackburne | i, 307, 323 |
| Mansfield, Earl of | Threshie and Henderson | i, 376, 379 |
| Manuel | Manuel | i, 87 |
| Mar | Kerr | i, 263 |
| March, Earl of | Dowie | ii, 49 |
| March, Earl of | Leven, Earl of | ii, 336 |
| Marchmont, Earl of | Fleming | ii, 52 |
| Marischall, Earl | Fraser | ii, 444, 447 |
| Marischall, Earl | Tenants | i, 125 |
| Marjonibanks | Spottiswood | ii, 30 |
| Marshall | Gartshore | ii, 97 |
| Marshall | Marshall | i, 216 |
| Marshall | Philip | ii, 408 |
| Marshall | Walker | ii, 489 |
| Marston | Underwood | i, 523 |
| Martin, petitioner | Easton | i, 183 |
| Martin | Easton | i, 341 |
| Martin | Marshall | ii, 284 |
| Martin | Roe | i, 304 |
| Martin | Stewart | i, 147 |
| Martin | Thomson | i, 343 |
| Mason and others | St Andrews, Magistrates of | i, 149 |
| Mather | Fraser | i, 229 |
| Matheson | Ross | i, 413 |
| Mathieson | Nicolson | ii, 524, 540, 541 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|---|--------------------------------|
| Mathison | Duff | i, 408 |
| Maule | Holiday | ii, 48 |
| Maule | Maule | i, 230, 232 |
| Maule | Robb and Fitchett | i, 518; ii, 447 |
| Maxwell | Bonar | i, 84 |
| Maxwell | Burgess | i, 379 |
| Maxwell | Copland | ii, 190, 210 |
| Maxwell | Drumlanrig | i, 75 |
| Maxwell | Dumfries, Provost of | i, 343 |
| Maxwell | Glasgow, College of | i, 142 |
| Maxwell | Glassock, Tenants of | ii, 577 |
| Maxwell | Grierson | i, 438, 439 |
| Maxwell | Henderson | ii, 497 |
| Maxwell | M'Murray | ii, 477 |
| Maxwell | Montgomery | ii, 462 |
| Maxwell | Queensberry's Executors, Duke of | ii, 271 |
| Maxwell | Tenants | i, 491 |
| Maxwell | Vassals | i, 260, 263 |
| Maxwell, Lady | Tenants | ii, 14, 51, 123 |
| Meek | Smith | ii, 368 |
| Meikle | Esplin | ii, 198 |
| Meikle | Meikle | i, 186, 209; ii, 113 |
| Meiklejohn | Erskine | i, 265 |
| Meiklejohn and others | Masterton and others | i, 149 |
| Meldrum | Gibb | ii, 478 |
| Mellerstanes | Haitley | i, 474 |
| Melville | Barclay | ii, 407 |
| Menmuir | Airth | ii, 182, 184, 212, 543 |
| Menzies | Duff | ii, 580 |
| Menzies | Mackay | ii, 198 |
| Menzies | Menzies | i, 333, 334 |
| Menzies | Oswald | ii, 571 |
| Menzies | Queensberry's, Executors, Duke of | ii, 267, 271 |
| Mercer | Drummond | i, 263, 264 |
| Merchiston, L. | Napier | ii, 330 |
| Merry and Cunningham | Brown | ii, 522, 523 |
| Merse, Steward of | West Nisbet, L. | ii, 351 |
| Middletons | Maggat | i, 521; ii, 265, 273 |
| Middletons | Yorkston | i, 521; ii, 265, 273 |
| Middlethian and Fife, Jns. of Peace of | Galloway | i, 341 |
| Miller | Carrick | i, 92, 110 |
| Miller | Clelland | i, 261, 263, 264 |
| Miller | Craig | ii, 318 |
| Miller | Duncan | i, 507 |
| Miller | Gwydir, Lord | ii, 500 |
| Miller | Halles, Tenants of | ii, 310 |
| Miller | Jarvis | i, 147 |
| Miller | Mair | ii, 299 |
| Miller | Meldrum | ii, 448 |
| Miller | Paterson and Ireland | ii, 419, 424, 435 |
| Miller | Stocks | i, 262 |
| Miln | Mitchell | ii, 472 |
| Milne | Kidd | i, 260 |
| Milne | Petrie or Young | ii, 7, 8, 10 |
| Milne, petitioner | | i, 184, 185, 186; ii, 114, 468 |
| Milne and others | Horn and others | ii, 294 |
| Mishall | Lloyd | i, 384 |
| Mitchell | Anderson | i, 478 |
| Mitchell | Berwick and others | ii, 442 |
| Mitchell | Little | ii, 594 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|--|------------------------|
| Mitchell | Morrison and others | ii, 186 |
| Mitchell | Pitaligo, L. of | ii, 571 |
| Mitchell and others, petitioners | | ii, 187 |
| Moir | Graham | i, 532, 533, 534 |
| Mollison | Smith and Nicol | ii, 383, 399 |
| Moncrieff | Arnott | ii, 192, 193 |
| Moncrieff | Balnagown, L. of | ii, 350 |
| Moncrieff | Hay | ii, 603, 604 |
| Moncrieff | Tod and Skene | ii, 230 |
| Moncrieff, petitioner, | | i, 181, 182 |
| Moncrieff and Curators | Perth, Provost of, and others | ii, 187 |
| Moncur | Campbell | ii, 197 |
| Monklands Railway Company | Glasgow, Airdrie, and Monklands Railway Company | i, 357 |
| Monkton, Lady | Balderston | i, 251 |
| Monro | Brown | ii, 126 |
| Monro | Cameron | ii, 161 |
| Monro | Drummond | i, 102 |
| Monro | Fraser | ii, 256, 598 |
| Monro | Hogg | i, 411 |
| Monro | M'Kenzie | ii, 552 |
| Monro | Miller | i, 191; ii, 587 |
| Monro | Monro | i, 170, 236; ii, 250 |
| Monro | Robertson's Trustees and others | ii, 434 |
| Monteith, Lord | Tenants | i, 363, 364, 366 |
| Montgomerie and others | Carrick and Napier | i, 482; ii, 513, 524 |
| Montgomery | Brown | ii, 155 |
| Montrose, Magistrates of | Scott | i, 341 |
| Montrose, Marquis of | Walkinshaw | i, 448 |
| Monymusk | Forbes, Lord | i, 983 |
| Moodie | Leighton | ii, 354 |
| Moon | Roger | ii, 213 |
| Moore | Boddan | i, 211 |
| Moore's Trustees | Wilson | i, 144, 145 |
| Moray, Countess Dowager of | Stewart | i, 124, 441, 448 |
| Moray, E. of | Hume | ii, 122 |
| Moray, E. of | Kinghorn, Mag. of | i, 341, 342 |
| Moray, Heiress of E. of | Sanguhar, Tutors of | i, 472 |
| Mordaunt, Baroness | Innes | i, 106, 107, 108, 109 |
| Moreham, Baron of | Beuford or Beinston | i, 76 |
| Morgan | Arbuthnot, Viscount | ii, 15 |
| Mories | Glen | i, 412 |
| Morris | Allan | ii, 56 |
| Morrison | Blair | ii, 498 |
| Morrison | Carron Co. and Dawson | ii, 618 |
| Morrison | Flethers of Edinburgh | i, 150 |
| Morrison | Orchardton, Tenants of | ii, 345 |
| Morrison | Patullo and Laird | i, 483; ii, 238 |
| Morrison, petitioner | | i, 183 |
| Morrison, petitioner | | i, 184 |
| Morrison and Brechin | M'Kirdy and Kirkwood | i, 379 |
| Morrison and M'Callum | Campbell | i, 364, 369 |
| Morrison, L. | East Nisbet, Tenants of | ii, 444 |
| Morton | Montgomery | ii, 614 |
| Morton | Graham | ii, 310, 312, 547, 548 |
| Morton & Co. | Colquhoun and M'Farlane | ii, 66 |
| Morton, Earl of | Scott | i, 524 |
| Morton, Earl of | Somerville | ii, 424, 609 |
| Morton, Earl of | Tenants | i, 520 |
| Morton, Earl and Countess | Murray's Representatives | ii, 126, 144 |
| Mosman | Brocket | ii, 239, 254 |

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---------------------------------|---------------------------------|----------------------|
| Motley | Downman | i, 845 |
| Moncey and others | Kennedy and others | i, 427 |
| Monsewell and others | The Children | i, 127, 273, 275 |
| Mowat | Davidson | ii, 197 |
| Mowat | Denholm | ii, 449 |
| Mowat | Johnstone | i, 368 |
| Mowbray | Drummond | ii, 609 |
| Mowbray | Ewbank | ii, 555 |
| Muckal | Tenants | i, 464 |
| Muckerie, Parson of | Abercromby | i, 135 |
| Mudie | Craigie | ii, 291 |
| Mudie | Tenants | ii, 44 |
| Muir | Downie | ii, 435 |
| Muir | Wilson | i, 263; ii, 506, 555 |
| Muirhead | Drummond | i, 273; ii, 384 |
| Muirhead | Glasford | i, 139 |
| Muirhead | Haddington, Town of | i, 149 |
| Muirhead | Uddingston, Feuars of | i, 264, 285 |
| Muirhead and Curators | Black and others | i, 120; ii, 500 |
| Muirhead and others | Tenant & Co. | ii, 513, 518 |
| Mungle | Young | ii, 569 |
| Munro | Baillie | ii, 109 |
| Munro | Munro | i, 282 |
| Munro | Hogg | i, 411 |
| Murdoch | Carstairs | ii, 188 |
| Murdoch | Fullarton | ii, 453 |
| Murdoch | Inglis | i, 129; ii, 12 |
| Murdoch | Moir | i, 441 |
| Murdoch | Murdoch's Trustees | i, 226 |
| Mure | Mure | i, 92, 93 |
| Murray | — | i, 369 |
| Murray | Balconquhal | ii, 476, 535 |
| Murray | Bisset | i, 313, 391; ii, 218 |
| Murray | Brodie | ii, 117 |
| Murray | Bruce | ii, 307 |
| Murray | Buchanan | ii, 276, 557, 565 |
| Murray | Douglas | ii, 641 |
| Murray | Drummond | ii, 342 |
| Murray | Hogarth | i, 215 |
| Murray | M'Culloch | i, 264, 265 |
| Murray | M'Kenzie | i, 78 |
| Murray | Torrie | ii, 166, 177 |
| Murray | Trotter | ii, 465 |
| Murray Kinniamond | Cathcart and Rochied | ii, 331 |
| Murray's Trustees | Dalrymple | i, 164 |
| Murray's Trustees | Ducat's Trustees | ii, 247 |
| Murray's Trustees | Gordon | ii, 500, 535, 536 |
| Murray's Trustees | Jardine | ii, 344 |
| Musselburgh, Town of | Tweeddale, M. of | i, 261 |
| Musselburgh, Town of | Wauchope | i, 263 |
| Myline | Horne and others | ii, 294, 295 |

N

| | | |
|-------------------------|-----------------------------|---------|
| Napier | Fernier | ii, 224 |
| Naylor | Callings | i, 306 |
| Neil | Leslie | i, 412 |
| Neill | Cassilis, Earl of | i, 365 |
| Neilson | Mensies | i, 489 |
| Neilson | Vallance | ii, 193 |
| Newton, L. of | Inglis | i, 263 |

| <i>Petitors.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--------------------------------------|------------------------------------|---------------------------------|
| Newliston, Minister of | Heritors of | i, 613 |
| Nicol | Fraser | i, 408 |
| Nicol | Grosset | ii, 85 |
| Nicol | Parke | i, 477 |
| Nicoll | Aberdeen, Magistrates of | i, 150 |
| Nicolson | Bonar | ii, 123 |
| Nicolson | Inglis | i, 164 |
| Nicolson | M'Allister's Trustees | ii, 466 |
| Nicolson | Tillicoultry, Feuars of | i, 259, 260 |
| Nicolson, Steuart | Houston | ii, 323, 325 |
| Niddry, L. of | Murray | i, 168 |
| Nisbet | Baikie | ii, 465, 466 |
| Nisbet | Johnston | ii, 447 |
| Nisbet | Kinnaird | ii, 184 |
| Nisbet, &c. | Aikman | ii, 38, 99, 102, 103, 132 |
| Nisbet & Co.'s Trustees, petitioners | | ii, 172, 597 |
| Nithsdale, Earl of | Brown | i, 487 |
| Nithsdale, Lady | Tenants | ii, 5, 51 |
| Niven | Grieve | ii, 609 |
| Niven | M'Farlane | ii, 586 |
| Niven | Pitcairn | i, 297, 298, 299, 310, 317, 321 |
| North and George | Cumming | ii, 336, 337 |
| Northesk, Earl of | Rolland | i, 331; ii, 478 |
| Northern Railway Company, Great | Eastern Counties Railway Co. . . . | i, 349 |

O

| | | |
|---------------------------------|---------------------------------|---------------------------|
| Officer | Nicolson | ii, 218, 239 |
| Ogilvie | Fullarton's Creditors | i, 238, 239, 249; ii, 588 |
| Ogilvie | Gruar | ii, 302 |
| Ogilvie | Mearns and Keith | i, 527 |
| Ogilvie | Mellis | i, 197 |
| Ogilvie | Pittendreich | ii, 14 |
| Ogilvie | Wingate | ii, 400, 404 |
| Ogilvie and Dakers | Guthrie and Martin | i, 269; ii, 200 |
| Ogilvy | Devon Iron Company | ii, 519, 538 |
| Old Deer, Minister of | Heritors of | i, 137 |
| Oliphant | Currie | i, 466, 480 |
| Oliphant | Peebles | ii, 204 |
| Oliphant | Scott | i, 103; ii, 270 |
| Oliphant | Tenants | ii, 323 |
| Oliphant | Thomson | i, 312; ii, 218, 244 |
| Oliver | Suttie | ii, 183, 183 |
| Oliver | Weir's Trustees | ii, 64 |
| Ord | Fydie, Tenants of | i, 490 |
| Orme | Scarmann or Diffors | i, 207 |
| Orr | Adam | i, 266 |
| Orr's Trustees | Tullis | ii, 436 |
| Oswald | Gordon | ii, 514, 538 |
| Oswald | Grange | ii, 545 |
| Oswald | Pearson and others | ii, 519 |
| Oswald | Robb | i, 462 |

P

| | | |
|---------------------------------|-----------------------------------|-------------|
| Palaley, Magistrates of | Glasgow, Road Trustees of | ii, 332 |
| Panmure, Earl of | Collison | ii, 365 |
| Panmure, Earl of | Morgan | ii, 176 |
| Park | Cockburn | ii, 414 |
| Park | Glasgow, University of | i, 139, 141 |
| Parkhill | Chalmers | i, 208, 210 |

INDEX OF CASES CITED.

lxi

| <i>Petitioners.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|--|---------------------------|
| Parlane | Hamilton | ii, 460 |
| Partoun | Drumraah | i, 483 |
| Partoun | Tenants | i, 464 |
| Paterson | Adamson | ii, 613 |
| Paterson | Blair | ii, 541, 553 |
| Paterson | Burton | i, 368 |
| Paterson | Fariah | i, 227 |
| Paterson | Fife, E. of | i, 369; ii, 248 |
| Paterson | Foreman | ii, 582 |
| Paterson | Scarlett | ii, 10 |
| Paterson | Smith | ii, 330 |
| Paton | Couston | ii, 171 |
| Paton | Macintosh | ii, 16 |
| Patrick | Watt | ii, 446 |
| Paul | Anstruther | ii, 341 |
| Paxton | Hunter | ii, 7 |
| Paxton | Slack | ii, 3, 32 |
| Peacock | Edinburgh, Magistrates of | i, 343 |
| Peacock | Lauder | i, 466 |
| Peddle | Brown and others | ii, 541 |
| Peddle, petitioner | | ii, 467 |
| Pendreich's Trustees | Dewar | ii, 251, 615 |
| Pemman and Campbell | Kerr | ii, 343 |
| Pemman and others | Martin and others | ii, 3, 67 |
| Penry | Brown | i, 309 |
| Penson and Robertson, petitioners | | ii, 377 |
| Pentland | Booth | ii, 428 |
| Pentland | Scott and others | ii, 441 |
| Pentland | Royal Exchange Insurance Co. and Campbell | ii, 355 |
| Penton | Roberts | i, 297, 303, 305, 306 |
| Perth, Bakers of | Perth, Millers of | i, 262 |
| Perth, Magistrates of | Andrew | ii, 14 |
| Perth, Magistrates of | Black | i, 144, 145 |
| Perth, Road Trustees of | Magistrates of | ii, 322 |
| Peter and Monro, competing | | ii, 408 |
| Peterborough, Earl of | Milne | i, 237, 240 |
| Petley | M'Kenzie | i, 257; ii, 332, 333, 334 |
| Pew | Meroer | ii, 214 |
| Phernierst | Innerkeithing | ii, 111 |
| Philip | Cumming's Executors | i, 375, 369 |
| Phillips | Easson | ii, 392 |
| Phillips | Hartley | i, 414 |
| Phillips, petitioners | | i, 209 |
| Philp | Morton | ii, 492 |
| Philp | | i, 147 |
| Phin | Duncan | ii, 571 |
| Phin | Phin | ii, 138 |
| Piers | Black | ii, 276 |
| Pilkingdon | Poach | i, 200 |
| Pirrie | Murray | i, 126 |
| Pitarro | Stuart | i, 259, 260 |
| Pitcairn | Drummond | ii, 226 |
| Pitcairn | Pitcairn | i, 227 |
| Pitcairn and others, petitioners | | i, 176, 186 |
| Pitfodds, Lady | Pitfodds, Tenants of | ii, 613 |
| Pitaligo, Lord | Paton | i, 366 |
| Pitt | Shewin | ii, 364 |
| Plummer | Tutors | i, 185 |
| Pollock | Craig | i, 430 |
| Pollock | Menzies and others | ii, 194 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---------------------------------|-----------------------------------|---|
| Pollock | Paton | ii, 497 |
| Pollock | Wilson | i, 180 |
| Pollock and others | M'Leod and others | i, 129 |
| Pollock, Gilmour, & Co. | Harvey | i, 332, 336, 365, 452, 454 |
| Polwarth, Lord | ii, 369, 367, 370, 373, 393 | |
| Polwarth, Lord | Hume | ii, 671 |
| Foole's Case | ii, 305, 324 | |
| Porter | Faterson and Douglas | i, 255 |
| Porterfield | Cunninghame | ii, 438 |
| Portland, D. of | Baird & Co. | i, 241, 248, 250, 253, 254 ; ii, 174 |
| Portland, D. of | Gray and others | i, 278 |
| Pott and others | Sampeon | ii, 474 |
| Pourie, L. of | Riddell and others | ii, 340 |
| Powel | Hunter | ii, 141 |
| Power | Edmunds | i, 408 |
| Pratt | The Customers | i, 363 |
| Preston | Abercromby | i, 220, 418, 443, 499 |
| Preston | Cockpen, L. of | ii, 86 |
| Preston | Duddingston, Tenants of | i, 490 |
| Preston | Preston | i, 128 |
| Preston | Scott | ii, 440 |
| Preston, Lady | Gregor | ii, 416, 436 |
| Pringle | Hume, Earl of | ii, 101 |
| Pringle | M'Crae | ii, 502 |
| Pringle | M'Laggan | i, 241 |
| Pringle | M'Murdo | i, 331; ii, 478 |
| Pringle | Murray | ii, 445 |
| Pringle | Pringle's Executors | ii, 329, 333, 335 |
| Pringle | Scott | i, 131, 133, 273; ii, 391 |
| Pringle | Tenants | ii, 19, 20 |
| Proctor | Gordon | i, 184 |
| Proctor, petitioner | Arthur | ii, 234 |
| Prodgers | Arthur | i, 200 |
| Pugh | Arton | i, 324 |
| Purves | Gentle | ii, 176, 177, 255 |
| Purves | Rutherford | ii, 489 |

Q

| | | |
|--|---|--|
| Queen's Advocate and Crawford | Archibald | i, 194 |
| Queensberry, Duke of | Annandale, Marquis of | i, 280, 282 |
| Queensberry, Duke of | Barker | ii, 52, 63 |
| Queensberry, Duke of | Telfer | ii, 57 |
| Queensberry, Duke of | Wemyss, Earl of | i, 103, 105, 108, 115 |
| Queensberry's Executors, D. of | Buccleuch, Duke of | i, 105, 114, 116 |
| Queensberry's Executors, D. of | Maxwell | ii, 271 |
| Queensberry, Marquis of | Duke of Queensberry's Executors | i, 93, 103, 110, 116, 117, 118; ii, 132 |
| Queensberry, Marquis of | Haining | ii, 185 |
| Queensberry, Marquis of | Wight and others | i, 427 |
| Queensberry's Trustees, D. of | Wemyss, Earl of | i, 73, 115 |
| Queensberry's Trustees, D. of, and Hyslop | Buccleuch, Duke of | i, 93, 110 |
| Queen's College, Provost of | Buccleuch, Duke of | i, 71 |
| Quhyte | Brown | i, 212 |

R

| | | |
|-------------------|---------------------|----------------------|
| Rae | Finlayson | i, 451, 481; ii, 237 |
| Rae | Henderson | ii, 65, 136 |
| Railton | Muirhead | ii, 365 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|-----------------------------------|---|------------------|
| Ramage & Co. | Briggs | ii, 586 |
| Ramsay | Brewhouse | i, 264 |
| Ramsay | Commercial Bank of Scotland i, 517; ii, 173 | |
| Ramsay | Conheath, L. | ii, 86 |
| Ramsay | Hume | ii, 28 |
| Ramsay | Kirkcaldy, Town of | i, 264 |
| Ramsay | Ogilvie | i, 436 |
| Ramsay | Stewart | ii, 40 |
| Ramsay | Weir | ii, 47 |
| Ramsay, Lord | Homes | ii, 12, 21 |
| Randiford, L. | Tenants | ii, 472 |
| Rankin | M'Lachlan | ii, 107, 143 |
| Rankin | Dixon & Co. | ii, 539, 564 |
| Rankin | Marshall | ii, 524 |
| Rattray | Graham | i, 223, 234, 236 |
| Reay, Lord | Anderson | i, 154, 167, 171 |
| Reay and others | Chalmers | ii, 543 |
| Redhead | Kerr | i, 111 |
| Redpath | White | i, 473 |
| Reekie and others | Gardiner | i, 147 |
| Reid | Hamilton | ii, 142 |
| Reid | Keith | ii, 510 |
| Reid | Marshall | ii, 125 |
| Reid | Ogilvie | ii, 447 |
| Reid | Shaw | ii, 275 |
| Reid and Magistrates of Edinburgh | Boyd and others | i, 342; ii, 303 |
| Renton | Younger | ii, 205 |
| Renton and others | Buchan and Husband | ii, 229 |
| Restalrig | Craw | i, 475 |
| Rex | Eastborne | i, 200 |
| Rex | Hockworthy | i, 414 |
| Rex | Otley | i, 302 |
| Rex | Pedley | ii, 568 |
| Richard | Lindsay | i, 443, 491 |
| Richardson | Harvey | ii, 162 |
| Richardson | Scott | ii, 699, 601 |
| Richmond, D. of | Duff | i, 279; ii, 211 |
| Richmond, D. of | Dempster | ii, 190 |
| Riddel | Zinsan | ii, 87, 72, 84 |
| Riddell | Groeset | ii, 463 |
| Riddick | Wightman | i, 375; ii, 469 |
| Ridley | Haig's Creditors | ii, 408 |
| Rig | Durward and Thom | ii, 447 |
| Rig | N., Tenants of | i, 213 |
| Ritchie | Dickson | ii, 22 |
| Ritchie | E. of Wemyss | ii, 534 |
| Robb | Forrest | i, 411 |
| Robb | Menzies and Wright ii, 65, 62, 83, 89, 106 | |
| Roberts | Rosebery, E. of | ii, 548 |
| Roberts | Wallace and Douglas | ii, 619 |
| Robertson | Galbraith | ii, 545 |
| Robertson | Gibson | i, 276 |
| Robertson | Jardine | ii, 406 |
| Robertson | Arbuthnot | ii, 194 |
| Robertson | Athole, Duke of | ii, 505 |
| Robertson | Boswell | ii, 419 |
| Robertson | Bruce and Buchanan | ii, 420 |
| Robertson | Calder | ii, 58 |
| Robertson | Campbell and Pillans | ii, 554, 517 |
| Robertson | Clark | ii, 363, 575 |
| Robertson | Elphinston | i, 171, 155 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|-------------------------------|---|-----------------------|
| Robertson | Macintosh | ii, 406 |
| Robertson | Menzies | i, 214; ii, 541 |
| Robertson | Orme | ii, 436 |
| Robertson | Peter | i, 136 |
| Robertson | Robertson | ii, 209 |
| Robertson | Scott and others | ii, 114, 690 |
| Robertson | Shaw | i, 264 |
| Robertson | Spalding | i, 465; ii, 48 |
| Robertson | Stewart and Livingston | ii, 564 |
| Robertson, petitioner | | ii, 113, 167, 468 |
| Robertson, petitioner | | ii, 226 |
| Robertson, J., petitioner | | ii, 234 |
| Robertson & Co. | Drysdale | i, 527; ii, 489 |
| Robertson and others | | i, 147 |
| Robinson | Dryburgh | i, 414 |
| Robson | Hall | i, 408 |
| Rochéad | Moodie | i, 239, 240, 249 |
| Rocheid | Borthwick | ii, 181 |
| Rodger | Crawford | i, 607, 514 |
| Rodger | Gibson | ii, 504 |
| Roffey | Henderson | i, 324 |
| Roebuck | Hamilton, D. of | i, 176 |
| Rolfe | Harris | ii, 264 |
| Rolfe | Peterson | ii, 160, 486 |
| Rollo | Murray | ii, 405 |
| Rollo | Reid | i, 408 |
| Rollock | | i, 464 |
| Romana, L. of | Nisbet | ii, 143 |
| Ronald | Strang | i, 464 |
| Ronaldson | Ballantine | i, 323 |
| Ronaldson, petitioner | | i, 220, 238, 471 |
| Rorison | Shaw | ii, 287 |
| Rose | Tenants | ii, 332 |
| Rosebery, E. of | Brown | ii, 115 |
| Roseburn, Hairs of | | i, 128 |
| Ross | Aberdeen, College of | i, 130, 142 |
| Ross | Aglionby | i, 81 |
| Ross | Blair | i, 240, 475, 480 |
| Ross | Fleming | ii, 463 |
| Ross | Fowles, Lady | ii, 525 |
| Ross | Hawkins and others | ii, 230 |
| Ross | Heriot's Hospital, Governors of | i, 144 |
| Ross | M'Finlay | ii, 118 |
| Ross | Mitchell | ii, 435 |
| Ross | Moncrieff | ii, 600 |
| Ross | Monteith | ii, 173, 679 |
| Ross | Ross | i, 175, 176, 177, 179 |
| Ross | Ross | i, 430, 441 |
| Ross | Ross | ii, 58 |
| Ross | Stevens | i, 408 |
| Ross | Sutherland, Duchess Countess of | i, 483; ii, 152 |
| Ross | Webster | i, 326, 409; ii, 93 |
| Ross | Williamson | ii, 367, 368, 410 |
| Ross, Bishop of | Drummond | i, 73 |
| Ross, Lady | Tenants | ii, 14 |
| Rossy | Tenants | i, 126, 167 |
| Rosyth, Lady | Wood | ii, 444 |
| Rothas, Countess of | Campbell | ii, 38 |
| Rowallan | Boyd's Bailie | ii, 59, 80 |
| Rowan | Barr | ii, 408, 409 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|-----------------------------------|--|--------------------------------|
| Bowat | Whitehead | ii, 552 |
| Roxburgh, D. of | Archibald | i, 252; ii, 478 |
| Roxburgh, D. of | Hume, E. of, and E. of Tankerville, i, 282 | |
| Roxburgh, D. of | Kerr | i, 107; ii, 124 |
| Roxburgh, D. of | Ramsay and others | i, 281, 282 |
| Roxburgh, D. of | Robertson | ii, 492 |
| Roxburgh, D. of | Roxburgh, Dowager Duchess of i, 125, 128 | |
| Roxburgh, E. of | Gray | ii, 123 |
| Roxburgh, E. of | Maison Dieu, Tenants of | i, 144 |
| Key | Wemyss, E. of | ii, 93 |
| Royal Bank | Dixon | ii, 613 |
| Rule | Hume | i, 234 |
| Rancie | Lumsden and others | ii, 231 |
| Russel & Son | Gillespie | ii, 614 |
| Russell | Breadalbane, E. of i, 505, 506; ii, 592 | |
| Russell | Clark | ii, 543 |
| Russell | Freen and others | i, 435, 518; ii, 549 |
| Russell | Hutchison | ii, 307 |
| Russell, petitioner | — | i, 179, 186 |
| Russell and Ramsay | Cochrane and others | ii, 432, 607 |
| Ruston's Case | — | i, 82 |
| Rutherford | Scott | ii, 397 |
| Rathven | Arbuthnot | ii, 393 |
| S | | |
| Saltoun, Lord | Club | ii, 392, 410, 411 |
| Saltoun, Tenants of | A | ii, 571 |
| Samford, Lady | Laird, The | ii, 391 |
| Samford, Lady | Walker | i, 477 |
| Samuel | Samuel | ii, 245 |
| Sanderson | Tweeddale, Marquis of | i, 252 |
| Sandilands | Carmichael | ii, 20 |
| Sanderson | Town of Musselburgh | i, 150 |
| Sawers | M'Connell | i, 277; ii, 267, 286, 482 |
| Sayer | Bennet | i, 191 |
| Schaw | Tenants | ii, 440 |
| Scott | — | ii, 397 |
| Scott | Baird | i, 233, 234; ii, 22 |
| Scott | Boyle or Brown | ii, 188 |
| Scott | Boyd and Latta | i, 366, 436; ii, 85, 89 |
| Scott | Brodie | ii, 482 |
| Scott | Christie | ii, 96 |
| Scott | Durham | ii, 478 |
| Scott | Erskine | ii, 422 |
| Scott | Ewart's Representatives, i, 314; ii, 245 | |
| Scott | Fisher | ii, 9, 17, 18 |
| Scott | Graham | i, 492 |
| Scott | Scott | ii, 406 |
| Scott | Straiton | i, 373, 483, 469 |
| Scott | Tait and Russell | ii, 543 |
| Scott | Thom | ii, 355 |
| Scott | Whitelaid, Tenants of | ii, 350 |
| Scott | Wotherspoon | ii, 123, 135 |
| Scottish Union Insurance Company | Mackintosh | ii, 264 |
| Scrymgeour | Mitchell | i, 226 |
| Seaforth's Trustees | M'Aulay | ii, 179 |
| Selkirk, Magistrates of | Clapperton and others | i, 140, 150, 156, 318; ii, 244 |
| Selkirk | French | ii, 393 |
| Sellar | Aiton | i, 369 |
| Sellers | Brown | ii, 223 |
| Seton | Caekieben | i, 86, 208 |

| <i>Petitioners.</i> | <i>Defenders.</i> | PAGE |
|--------------------------------|----------------------------------|---|
| Seton | Seton | ii, 139, 138, 141 |
| Seton | White | i, 464, 480; ii, 204 |
| Seyton | Ogilvie | i, 204 |
| Shanks | Grant | ii, 96 |
| Sharpe | Burt | ii, 214 |
| Sharpe | Clark | ii, 119 |
| Sharpe | Maxwell | ii, 391 |
| Sharpe | Napier | i, 439 |
| Sharpe | Smith | ii, 616 |
| Sharpe's Trustees | Monboddo, Lord | ii, 452, 457 |
| Shaw | Palmer | ii, 39 |
| Shaw, petitioner | | i, 184, 185 |
| Shaw and Mackenzie | Ewart | ii, 503 |
| Shinas | Fordyce | ii, 23, 23 |
| Shepherd, petitioner | | i, 181 |
| Sheppard | Watberston and others | ii, 343 |
| Sheriff | Lovat, Lord | ii, 216, 240, 490 |
| Shirlaw | Wilson | ii, 20 |
| Shotts Iron Company | Faton | ii, 87 |
| Sibbald | Home | ii, 38 |
| Sibbald | Sinclair, Lord | i, 316 |
| Siddons | Ryder | i, 347 |
| Sievevright | Scott | i, 433, 449 |
| Simpeon | A | ii, 449 |
| Simpeon | Crichton | ii, 491 |
| Simpeon | Denison | i, 349 |
| Simpeon | Duff | ii, 130 |
| Simpeon | Fordyce's Trustees | i, 260, 264 |
| Simpeon | Gray | i, 241 |
| Simpeon | Harley | i, 332 |
| Simpeon and Kelly | Haliday | ii, 303 |
| Simpeon's Tr. | Carnegie | ii, 489 |
| Sinclair | Dalrymple | ii, 168 |
| Sinclair | Hutchison | ii, 456 |
| Sinclair | M'Beath | i, 284, 373, 375, 431, 437, 438, 441; ii, 225, 240 |
| Sinclair | Manderstun | ii, 111 |
| Sinclair | Manson | ii, 243, 251, 252, 253 |
| Sinclair | Mossend Iron Company | i, 437; ii, 469 |
| Sinclair | Sinclair | i, 379; ii, 142, 341, 343 |
| Sinclair and others | Duffus, Lord | i, 332 |
| St Clair | Grant | ii, 65 |
| Skeen | | i, 365, 370; ii, 495 |
| Skene | Greenhill | i, 235; ii, 170 |
| Skene | Maberly | ii, 473, 474, 555 |
| Skene | Reddis | i, 269 |
| Skene | Ross | i, 342, 343 |
| Skene | Spankie | i, 431, 448 |
| Skene | Tenants of | ii, 354 |
| Skirving | Smellie | i, 157 |
| Skirving and Young | Vernor | ii, 189 |
| Slade, petitioner | | i, 180, 186 |
| Sloan | Hawthorn | ii, 462 |
| Slowey | Robertson & Moir | ii, 56 |
| Small | Balderston, Tenants of | ii, 13 |
| Smart | Ogilvie | ii, 400 |
| Smeaton and Hepburn | Brand | i, 316 |
| Smellie | Lockhart | ii, 190 |
| Smith | Falconer and others | ii, 464 |
| Smith | M'Gill, Hamilton | ii, 207 |
| Smith | Marischall, Earl | ii, 129 |

INDEX OF CASES CITED.

lxvii

| <i>Pursuers.</i> | <i>Defenders.</i> | PAGE |
|---|---------------------------------------|----------------------|
| Smith | Robertson | ii, 152, 179, 541 |
| Smith | Rogerson | ii, 274, 522 |
| Smith | Ross | ii, 267 |
| Smith | Smeton and Beinston, L. of | ii, 611 |
| Smith | Sutherland | ii, 303 |
| Smith and Trustee | Duff and others | ii, 567, 668 |
| Smollet's Creditors | Smollet | i, 108 |
| Somervel | Aitken | ii, 194 |
| Somerville | Gordon | i, 339 |
| Somerville | Smith | i, 283 |
| Somerville's Factor, petitioner | Wauchope | i, 177, 186 |
| Souper | Wauchope | i, 238 |
| Speirs' Tutors, petitioners | Anstruthers | i, 191, 182 |
| Spence | Scott | ii, 611 |
| Spence | Scott | i, 271 |
| Spencer, Sutherland & Co. | Hay | i, 367, 368, 442 |
| Spiney, L. of | Bothwell's Tenants | ii, 69 |
| Sprot, M. and T. | Morrison | ii, 285 |
| Sproul | Wilson and Wallace | i, 427; ii, 529 |
| Stanchill, Lady | Burd | ii, 100 |
| Stanfield | Wilson | i, 125, 127 |
| Stark | Edmonston | ii, 478, 535 |
| Stead | Cox | ii, 540, 599, 601 |
| Steedman | Kennedy | ii, 457 |
| Stell | Hay | ii, 197 |
| Stenhouse | Adamson | ii, 95 |
| Stephenson and others | Dunlop and others | ii, 47 |
| Stephenson's Trustees | Tweeddale, Marquis of | ii, 616 |
| Stevenson | Adair | i, 87 |
| Stevenson | Baird | ii, 37, 38 |
| Stevenson | Barclay | ii, 134 |
| Stevenson | Cooper | ii, 413 |
| Stevenson | Dobie | i, 464 |
| Stevenson | Job | ii, 122 |
| Stevenson | Love and Stevenson | i, 239, 450 |
| Stevenson | M'Culloch and Niven | ii, 431 |
| Stevenson | M'Laren | ii, 586 |
| Stevenson | Moncrieff | ii, 343 |
| Stevenson | Stevenson | ii, 16 |
| Steward | Lambe | i, 308, 308 |
| Stewart | Argyle, Duke of | ii, 520 |
| Stewart | Ayr, Viscount of | i, 372 |
| Stewart | Bell | ii, 159, 364, 377 |
| Stewart | Blackburn | i, 358 |
| Stewart | Burns and others | ii, 3 |
| Stewart | Cameron | ii, 257 |
| Stewart | Campbell | ii, 579 |
| Stewart | Cassillis, Earl of | ii, 43 |
| Stewart | Clark | i, 290, 375 |
| Stewart | Douglas | ii, 163 |
| Stewart | Dunmore's Trustees, Earl of | ii, 238 |
| Stewart | Fleming's Heir | ii, 464 |
| Stewart | Grimmond's Repres. | ii, 81, 481 |
| Stewart | Kerr | ii, 45 |
| Stewart | Lead | ii, 117, 215 |
| Stewart | Leith | i, 364, 365 |
| Stewart | M'Andrew | ii, 302 |
| Stewart | M'Barnet | i, 283 |
| Stewart | M'Naughten | ii, 167 |
| Stewart | M'Ra | i, 481; ii, 237, 579 |
| Stewart | Minto, Earl of | ii, 530 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|---|-----------------------------------|
| Stewart | Neilaona | ii, 530 |
| Stewart | Paisley, Magistrates of | i, 168 |
| Stewart | Peddie | ii, 394, 426, 591 |
| Stewart | Pirrie and others | i, 257 |
| Stewart | Roe | ii, 386, 395 |
| Stewart | Rutherford | ii, 115 |
| Stewart | Samelston, Lady | i, 194, 249 |
| Stewart | Sawyers | ii, 189, 268 |
| Stewart | Sharpe | ii, 67 |
| Stewart | Spelding | ii, 7 |
| Stewart | Stewart | i, 163 |
| Stewart | Stewart's Exrs. | i, 122, 123, 273, 274 |
| Stewart | Webster | i, 196 |
| Stewart | Watson | ii, 134, 142 |
| Stewart and Gibb | Ward and others | ii, 189, 268, 365, 418 |
| Stewart and others | Caithness and Smart | ii, 187 |
| Still's Trustees | Chivas | ii, 439 |
| Stirling | Christie | ii, 209 |
| Stirling | Dunn | i, 90, 94, 106, 107; ii, 173, 528 |
| Stirling | Gordon | ii, 46 |
| Stirling | M ^c Queen | ii, 608 |
| Stirling | Miller | ii, 131, 152 |
| Stirling | Strang | ii, 509 |
| Stirling | Walker | i, 106, 108 |
| Stirling and Dunfermline Railway Co. | Edinburgh and Glasgow Railway Co. | i, 261, 356 |
| Stobbs | Caven | i, 260, 264; ii, 194 |
| Stonesfield, L. | M ^c Arthur | ii, 121 |
| Storer | Hunter | i, 324 |
| Stormonth, Viscount | Anderson | ii, 405 |
| Stormonth, Viscount | Lochmaben, Rentallors of | i, 426 |
| Stormonth, Viscount | Newall | ii, 445 |
| Strachan | Christie and others | ii, 455 |
| Strachan | Nicol | ii, 478 |
| Stracry | Lundie | ii, 122 |
| Strahorn | Cunningham | ii, 465 |
| Stratton | Graham | ii, 490 |
| Stuart | Cameron | ii, 257 |
| Stuart | Gillon's Tenants | ii, 69 |
| Stuart | Multures, Abstractors of | i, 259, 260 |
| Stuart's Liferent, Donators of | Tenants | ii, 437 |
| Summers & Son | Fairservice | i, 409; ii, 112 |
| Sumner | Bromilow | i, 324 |
| Sutherland | Graham | ii, 15 |
| Sutherland | Jeffrey | i, 357 |
| Sutherland | M ^c Kenzie | ii, 125 |
| Sutherland | Robertson | i, 210; ii, 223, 258 |
| Sutherland, Duchess Countess of | Gilchrist | i, 280, 282; ii, 552 |
| Sutherland, Duke of | Ross | i, 222 |
| Suttie | Prestonpans, Fishermen of | i, 248 |
| Suttie | Somers | i, 278 |
| Suttie | Baird and White | ii, 490 |
| Swan | Craigmillar, L. of | i, 497 |
| Swinton | Gawler | ii, 269 |
| Swinton | M ^c Dougal | ii, 332, 334 |
| Swinton | Roxburgh, Duches of | ii, 259, 372 |
| Swinton | Seton and others | i, 128 |
| Swinton | Stewart | ii, 359, 360, 396 |
| Sydsert | Tod | ii, 431 |
| Syme | Earl of Moray | ii, 587 |
| | | ii, 547 |

| Petitors. | Defenders. | PAGE |
|---------------------------|--|---------------------------------|
| Syme | Dalsiel | ii, 334 |
| Syme | Harvey | i, 296, 311, 315, 316, 319, 331 |
| Syme's Trustees | Fidler | i, 503 |
| Symington | Cranston | ii, 275 |
| Symington | Queensberry's Executors, D. of | ii, 270 |
| Symington | Weir | ii, 112 |

T

| | | |
|------------------------------|--|-----------------------|
| Tackman of Customs | Greenhead | ii, 455 |
| Tait | Gordon | ii, 74 |
| Tait | Maitland | i, 125 |
| Tait | Paton | ii, 544 |
| Tait | Shigo | ii, 85 |
| Tarbet | Bogle | i, 341 |
| Tarras | Innes | i, 261 |
| Tassie & Co. | Glasgow, Magistrates of | ii, 560 |
| Tassie & Co. | Miller and Wright | ii, 560 |
| Taylor | — | ii, 110 |
| Taylor | Bethune | ii, 236, 233 |
| Taylor | Boyle | ii, 132, 602 |
| Taylor | Brown | i, 341; ii, 233 |
| Taylor | Davidson and Broomfield | ii, 366 |
| Taylor | Duff's Tra. | ii, 490, 500 |
| Taylor | Knitter | ii, 72 |
| Taylor | Little | ii, 538 |
| Taylor | Maxwell | ii, 185 |
| Taylor | Taylor and Fairlie | ii, 186 |
| Taylor | Waters | i, 361 |
| Taylor | Bothwell and others (Fairley's Trustees) | ii, 606 |
| Taylor's Trustees | Queensberry's Executors, D. of | ii, 272 |
| Telfer | M'Dougal | i, 219, 237 |
| Tennent | Auchinleck | ii, 16 |
| Tennent | Drumkille, L. | ii, 610 |
| Tennent | M'Brayne | ii, 382 |
| Tennent | M'Donald and others | ii, 80, 112, 568, 603 |
| Tennent | Tennant | ii, 81 |
| Tersie | Burnett | ii, 437 |
| Thin | Scott | ii, 199 |
| Thom and Spairs | Jack | ii, 619 |
| Thomas | Pemberton | ii, 600 |
| Thomas and Mack | Dumbreck and M'Donald | i, 375; ii, 490 |
| Thomson | Alloa Brewery Co. | ii, 201 |
| Thomson | Boyd | ii, 304, 362 |
| Thomson | Brown | ii, 191 |
| Thomson | Christie | ii, 363 |
| Thomson | Coventry | ii, 257, 222 |
| Thomson | Elderson | i, 179; ii, 23 |
| Thomson | Fowler | ii, 219, 529 |
| Thomson | Garioch | ii, 180 |
| Thomson | Gordon | ii, 223, 454 |
| Thomson | Gray | ii, 506 |
| Thomson | Handyside and Sutherland | ii, 106, 374 |
| Thomson | Harvey | i, 319, 528; ii, 62 |
| Thomson | Jamieson | ii, 490 |
| Thomson | Merston | i, 153; ii, 60 |
| Thomson | Mowat | i, 91; ii, 237 |
| Thomson | Oliphant | i, 311, 313 |
| Thomson | Pagan | i, 87 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|-----------------------------|---|-----------------------------|
| Thomson | Bald | i, 465 |
| Thomson | Stevenson | i, 85, 100 |
| Thomson | Terney | i, 489; ii, 63 |
| Thomson | Watson | i, 219 |
| Thomson | Young | i, 377 |
| Thomson (of Mildens) | Kinglassie, Heirs of | i, 250 |
| Thomson and others | Parton | ii, 455 |
| Thomson's Representatives | Oliphant | ii, 477, 525, 537 |
| Thresher | East London Water Works Co. | i, 306 |
| Threipland, petitioner | | i, 181; ii, 325 |
| Threipland | Strachan | ii, 44 |
| Toek | Auchtergaven, Parishioners of | i, 138 |
| Tod | St Andrews, Magistrates of | i, 343 |
| Tod | Moncreiff and Skene | ii, 323 |
| Tod | Montgomery | ii, 393 |
| Touquohou's Executors, Lady | Creditors | ii, 330 |
| Toukina | Ashby | i, 413 |
| Topping | Barr | i, 283 |
| Torphichen, Lord | Pitfiddles, L. of | ii, 143 |
| Torrie | Munie and King's Remembrancer | i, 233 |
| Torry | Adam | ii, 430 |
| Touch, L. of | Ferguson | ii, 208, 249, 253 |
| Touch, L. of | Tenants | ii, 13 |
| Tough | Dumbarton Waterworks Comrs. | ii, 509 |
| Towers and others | Templeton | ii, 352 |
| Trall | Trail | ii, 5, 9, 61, 67 |
| Traquair, Earl of | Olison | i, 400 |
| Traquair, Lady | Cranston | ii, 410 |
| Traquair, Lady | Howatson | ii, 438 |
| Traquair's Tra | Innesleithen, Heirs of | ii, 206 |
| Trechrig, Lady | Baird | ii, 303 |
| Trotter | Clark and Lenoeman | i, 528 |
| Trotter | Cunningham and Smith | ii, 329, 331 |
| Trotter | Dennis | i, 238-9, 241, 249, 250 |
| Trotter | Hall | i, 237, 250 |
| Trotter | McEwan | i, 332 |
| Trotter | Boswell | ii, 338 |
| Tuffetardine, Earl of | Dainell | ii, 112 |
| Tulloch | Willoughby D'Eresby, Lady | ii, 295, 421 |
| Turnbull | Coutts | ii, 502 |
| Turnbull | Kerr | ii, 329, 333 |
| Turnbull | McDowall | ii, 616 |
| Turnbull | Scott | ii, 171 |
| Turner | Blackadder | ii, 610 |
| Turner | Nicolson | ii, 616 |
| Turner | Scott | ii, 610 |
| Turner | Turner | ii, 256, 527 |
| Turner | Turner | i, 109, 124 |
| Turners | Turner | i, 109 |
| Tweeddale, M. of | Brown | ii, 536, 537 |
| Tweeddale, M. of | Dairymple | i, 232 |
| Tweeddale, M. of | Dodds | i, 221 |
| Tweeddale, M. of | Hume | ii, 451 |
| Tweeddale, M. of | Murray and others | ii, 81, 435 |
| Tweeddale, M. of | Somner | i, 332; ii, 81, 435, 493 |
| Tweeddale, M. of | Somner | ii, 81, 102, 120, 481, 435 |
| U | | |
| Udny | Brown | i, 125; ii, 59, 60, 56, 502 |
| Underwood | Richardson and others | i, 493, 523 |
| Urquhart | MacKenzie Hay | ii, 125, 144, 544 |

| <i>Petitors.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|--|------------------------------------|--------------------------------|
| V | | |
| Valentine or Ballantyne | Ramsay | i, 252 |
| Vallance | M'Dowal | i, 184 |
| Vary | Thomson and others | ii, 557 |
| Veitch | Paterson | ii, 319, 531 |
| Veitch | Young | i, 233 |
| Veitch (of Ellilock) | | i, 118, 265 |
| Vere | Dale | i, 176, 177, 187 |
| W | | |
| Waddel | Brown | i, 453; ii, 436 |
| Waddel | Buchan | ii, 66 |
| Waddel | Waddel | i, 128 |
| Waddell, petitioner | | i, 173, 183 |
| Waldie | Commercial Bank, The | i, 323 |
| Walker | | i, 141 |
| Walker | Bayne | ii, 259 |
| Walker | Flint | i, 369, 375 |
| Walker | Husband's Creditors, Her | i, 164 |
| Walker | Turnbull | i, 293 |
| Walker and Herd | Thomson | ii, 323 |
| Walker and others | Mason and others | ii, 229 |
| Walker, Grant, & Co. | Grant | ii, 507 |
| Walker's Executrix | Low's Trustees | i, 498 |
| Wallace | | ii, 57 |
| Wallace | Campbell | i, 457, 503, 503, 510; ii, 621 |
| Wallace | Cathcart | ii, 69 |
| Wallace | Cunningham | i, 197 |
| Wallace | Forrester, Lord | ii, 355 |
| Wallace | Harvey | i, 458; ii, 577 |
| Wallace | Tenants | ii, 18, 48, 116, 123 |
| Wallace | Turner | ii, 130 |
| Wallace | Wallace | i, 176, 187 |
| Walmealy | Milne | i, 307 |
| Walpole and Alison | Beaumont, Montgomery | i, 481; ii, 257 |
| Wamphray | Irvine | ii, 136, 138 |
| Wand and Curstör | Stewart and Gibb | ii, 418 |
| Wansbrough | Maton | i, 302 |
| Wardell | Usher | i, 302 |
| Wardlaw | Mitchell | ii, 359, 386 |
| Wardlaw | Otterburn | i, 468 |
| Wardlaw's Executor, Donator of | Brown | ii, 438 |
| Wark | Bargaddie Coal Co. | i, 371, 380; ii, 517 |
| Warner | Cunningham | i, 130 |
| Warrington | Furber | i, 413 |
| Waterfall | Penistons | i, 306 |
| Waters | Houghton | i, 415 |
| Waters | Taylor | i, 191 |
| Waterson | Masson | ii, 103 |
| Watson | Brown | ii, 440 |
| Watson | Douglas | i, 191; ii, 587 |
| Watson | Erroll, Earl of | i, 332 |
| Watson | Gordon | i, 197 |
| Watson | Reid | ii, 610, 613 |
| Watson and others | Kidston & Co. | i, 322; ii, 185, 549 |
| Watson and others | Turner | ii, 273 |
| Watt | Bell and Balfour | ii, 526 |
| Watt | Duff | ii, 145 |
| Watt | Stewart | i, 363 |
| Wauchope | Borthwick | ii, 259 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|--|----------------------------|
| Wauchope | Gall and Ross | ii, 378 |
| Wauchope | Hope ii, 88, 514, 515 | ii, 515 |
| Wauchope | Stephens | ii, 193 |
| Waugh | Abercromby | ii, 57 |
| Waughton | Aiken | ii, 122 |
| Webster | Donaldson | ii, 345 |
| Webster | Farquhar | ii, 222 |
| Webster | Lyell | ii, 186 |
| Webster | Miller's Trustees | i, 168 |
| Weddell | Buchan | ii, 66 |
| Wedderburn | Mann | ii, 364 |
| Wedderburn, L. of | Longformacus, L. of | ii, 324 |
| Wedderburn, L. of | Nisbet ii, 143, 444 | ii, 324 |
| Wedderburn | Scottish Ry. Co. | i, 357 |
| Wedgewood | Catto | ii, 578 |
| Weir | Aiton | i, 342 |
| Weir | Drummond | ii, 394 |
| Weir | Dunlop | i, 87, 468 |
| Weir | Glenny | ii, 187 |
| Wells | Proudfoot and Miller | ii, 417 |
| Wellwood | Clarke | ii, 306 |
| Wellwood | Husband ii, 190, 210 | ii, 324 |
| Wellwood | Moncrieff | i, 90 |
| Welsh | Myers | ii, 600 |
| Wemyss | Campbell ii, 325, 355 | ii, 325 |
| Wemyss | Colliers, His | i, 271 |
| Wemyss | Goodsirs | ii, 610 |
| Wemyss | Gulland | ii, 211 |
| Wemyss | St Colme, Lady | ii, 444 |
| Wemyss | Wright | ii, 492 |
| Wemyss and Erskine's Trustees | Wilson | ii, 211, 547 |
| Wemyss and March, Earl of | Campbell i, 335; ii, 180 | ii, 588 |
| Wemyss, Earl of | Hewat | ii, 588 |
| Wemyss, Earl of | Hope | ii, 588 |
| Wemyss, Earl of | Hope's Trustees ii, 188, 512, 515, 516, 517 | ii, 588 |
| Wemyss, Earl of | Queensberry, Duke of, and Alex. Welsh | i, 93, 107, 108, 113 |
| Wemyss, Earl of | Queensberry's Executors, Duke of | i, 107, 113, 116; ii, 527 |
| Wemyss, Earl of | Queensberry's Executors, Duke of, and J. Murray | i, 94 |
| Wemyss, Earl of | Queensberry's Executors, Duke of, and W. Murray | i, 109, 110, 113, 115, 163 |
| Wemyss, Earl of | Queensberry's Executors, D. of, and M. Johnstone | i, 115 |
| West | Blakeway | i, 304 |
| West Nisbet, L. of | Swinton, L. of | ii, 329 |
| Weston and others | Woodcock | i, 324 |
| Weston & Sons | Potterrow, Tailors of ii, 560, 563, 564 | ii, 564 |
| Wetherell | Howall | i, 303 |
| White | Houston i, 311; ii, 218, 221 | ii, 218 |
| White | Kirkcaldy of Kinglassie | i, 146 |
| White | Macintyre | i, 129 |
| White | Moncrieff | ii, 464 |
| White and others | Christie | ii, 407 |
| Whiteford | Johnston | ii, 51 |
| Whitehead | Bennett | i, 306 |
| Whitson | Duncan | ii, 116 |
| Whitson | Ramsay & Co. | i, 172 |
| Whittingham | | ii, 85 |
| Whittingham | Hatellie | ii, 428 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|-------------------------------------|---|---|
| Wight | Dickson | ii, 518 |
| Wight | Hopetoun, Earl of | i, 254, 373, 463, 469; ii, 168-174, 219, 543 |
| Wight | Inglis | ii, 168 |
| Wight | Sutherland | ii, 84 |
| Wight | Wight's Trustees and Paterson | ii, 207 |
| Wigton, Earl of | | i, 259, 266, 267 |
| Wilkie | Kerr | ii, 455 |
| Williamson | Balgillo, L. of | ii, 444 |
| Williamson | Forbes | ii, 412 |
| Williamson | Fraser | i, 433 |
| Williamson | Johnston | ii, 109, 605 |
| Williamson | Ramsay | i, 135 |
| Williamson and Husband | Hay and others | ii, 322 |
| Williamson and others | Ewart and Curator | ii, 257 |
| Williamsons | Kennedy | i, 371 |
| Willoughby, L., d'Eresby's Trustees | Strathearn Hydropathic Establi- ment Company | ii, 55 |
| Wilson | Bryson | i, 100 |
| Wilson | Campbell | ii, 52, 120 |
| Wilson | Henderson | i, 443, 444; ii, 525 |
| Wilson | Douglas | i, 397 |
| Wilson | Jobson | i, 160 |
| Wilson | Leith Walk Trustees | i, 339 |
| Wilson | Madder | ii, 483 |
| Wilson | Norris | i, 286, 292; ii, 543 |
| Wilson | Pollock, Gilmour, & Co. | i, 286; ii, 279 |
| Wilson | Russell | ii, 611 |
| Wilson | Spankie | ii, 377, 378, 379 |
| Wilson | Stewart and Earl of Mansfield | i, 538; ii, 145 |
| Wilson | Swan | ii, 495 |
| Wilson | Warroch | ii, 428 |
| Wilson | Wilson | i, 425; ii, 5 |
| Wilson, Pettogrew | | i, 209 |
| Wilson and M'Beath | Holme | ii, 319, 607 |
| Wilson and others | Storie and others | i, 150, 156, 167 |
| Wilsos | Wilson | i, 156, 210 |
| Windham | Way | i, 302 |
| Wink | Mortimer | ii, 590 |
| Winraham | Henderson | i, 128 |
| Winraham | Iddington, Lady | ii, 405 |
| Wintoun, Earl of | Tenants | ii, 11 |
| Wishart | Arbuthnot, L. | ii, 196 |
| Witham | White & Young | ii, 363, 501, 538 |
| Wood | Moncur | ii, 71 |
| Wood | Paton | ii, 192, 487, 548 |
| Wood | Robertson | ii, 186 |
| Wood | Stewart | ii, 610 |
| Wood and Duncan | Sandeman | ii, 554 |
| Wood and Mandatory | Kerr | i, 472 |
| Woodney or Udney | Reid and others | i, 284 |
| Woodward | Gyles | ii, 150, 496 |
| Woodward and others | Wilson | ii, 353 |
| Wrexham | Huddleston | i, 191 |
| Wright | Butchart | i, 322 |
| Wright | Cartwright | ii, 160 |
| Wright | Cunningham | ii, 330 |
| Wright | Hopetoun, E. of | ii, 152 |
| Wright | Bannie | i, 261 |
| Wright | Walker and M'Kiag | i, 507; ii, 620 |
| Wright's Creditors | Kerr | ii, 607 |

| <i>Pursuers.</i> | <i>Defenders.</i> | <i>PAGE</i> |
|---|---------------------------|---------------------------------|
| Writers to the Signet . . . | Graham . . . | i, 157 |
| Wyld & Co. . . . | Richardson . . . | ii, 398 |
| Y | | |
| Yeaman | Gilruth . . . | ii, 181, 184 |
| Yeoman | Elliott and Forster . . . | i, 362, 502, 503, 505, 510, 522 |
| York Buildings Co. . . . | Adams . . . | ii, 222, 223 |
| York Buildings Co. . . . | Baillie and Thomson . . . | i, 429 |
| York Buildings Co. . . . | Buchan . . . | ii, 448 |
| York Buildings Co. . . . | Carnegie . . . | i, 188; ii, 3, 23 |
| York Buildings Co. . . . | Fordyce and others . . . | ii, 578 |
| York Buildings Co. . . . | Garden . . . | ii, 438, 439 |
| York Buildings Co. . . . | Grant . . . | ii, 319 |
| York Buildings Co. . . . | M'Kenzie . . . | i, 156 |
| York Buildings Co. . . . | Thriepland . . . | ii, 578 |
| York Buildings Co., Annuitants of . . . | Stewart . . . | ii, 455 |
| York Buildings Co., Tacksman of . . . | Cockburn . . . | i, 529 |
| Young | Colt's Trustees . . . | ii, 278 |
| Young | Cunningham . . . | ii, 208, 551 |
| Young | Gerrard . . . | ii, 201, 518 |
| Young | Malcolm . . . | i, 220; ii, 605 |
| Young and others . . . | Ramsay . . . | ii, 582 |
| Young and others . . . | Welsh . . . | ii, 474 |
| Young, Ross, & Co. . . . | Paton and others . . . | ii, 395 |
| Young's Trustees . . . | Anderson . . . | ii, 57, 103 |
| Yuille | Buchanan . . . | ii, 587 |
| Yuille | Stirling . . . | ii, 12, 365 |
| Yuille and others . . . | Lawrie and Douglas . . . | ii, 494 |
| | | ii, 406 |

HISTORICAL INTRODUCTION.

CHAPTER I.

OBJECT OF THE INTRODUCTION.

AN historical account of the origin and progress of the Contract of Lease, forms a necessary introduction to a Treatise upon the Law of Landlord and Tenant.

Location of land, using the word in a general sense, is known among nations in a comparatively low state of civilisation. But, indeed, it may be doubted, whether in this primitive form it should not rather be deemed that the contract, if such it can be called, constitutes the wages of labour given by occupation of land, than the location of the land itself. In this form location existed in Mexico,¹ and in Peru,² and in the Society Islands.³ In its most rude form the proprietors give a portion of their estates to labourers leaving them to extract the means of subsistence. As a rent for this land, a certain amount of labour is exacted to be applied to the remaining portion of the land which the proprietor himself retains. This form has been styled location under "labour or serf-rents."⁴ At one time it prevailed throughout a large part of Europe and still prevails in those large territories which occupy its eastern portion. This rude form was followed by the more complicated one which involves a division between the proprietor and the tenant, of the produce raised by the latter by means of corporeal capital supplied by the former, and which has ordinarily been called the system of "Metayer Rents." It was practised

Origin of
location of
land.

¹ Robertson's History of America, book vii. 8vo. ed. vol. iii. pp. 282-3.

² Robertson, *ut sup.* pp. 338-9.

³ Narrative of a Visit to Brazil, Chili, Peru, and the Sandwich Islands, during

the years 1821 and 1822. By Charles Farquhar Matheson, Esq. *Vide* pp. 383, 383, 412, 427, and 449.

⁴ Jones on the Distribution of wealth and Sources of Taxation," p. 17, *et seq.*

by the nations of antiquity and during the Middle Ages and is still [2] prevalent throughout continental Europe. Where the tenants are Metayers the contract of location is known both in a written and an unwritten form.¹ Money-rent and a formal written contract superseded, as civilisation advanced and agricultural capital increased, those unrefined modes of location. The object of this Introduction is to trace the contract of location as it was recognised among the ancient nations and during the Middle Ages to the time when it assumed, in Scotland, the tenor and the form which it now bears. In developing the progress of the contract, it is indispensable that the condition of the cultivators should be examined, as the history of those who, varying in numbers and in rights in different countries and at different times, constituted the class of tenants or lessees is inseparable from the history of the lease itself.

CHAPTER II.

WAS THE LEASE KNOWN TO THE HEBREWS?

Whether the lease was known to the Hebrews in a written form, or even as verbal, is a question of difficulty.² The question involves two subordinate divisions—1st, Whether the contract of location was known to the Hebrews at all? and 2d, Whether, if it was, they were acquainted with the written lease?

In discussing these questions, the result of research seems to be that a distinction must be made between the earlier and the later epochs of the history of the Hebrew nation. There is strong reason to conclude that, previously to the Babylonish captivity, the

¹ Full details relative to this system will be given in the following chapters of the Introduction, and also in other parts of the Treatise.

² In the two former editions of this Treatise the author adopted as applicable to the rural economy of the Jews in a general sense the opinion of Michaelis, that they were not acquainted with any other mode of cultivating lands, except by the proprietors themselves through the instrumentality of slaves, or hired labourers. This opinion, however, is limited by Michaelis to the

epoch before the Babylonish captivity. The parable of the "Wicked Husbandmen" made the author doubt whether, in later times, location of land was not in use. An examination of the subject has unavoidably led him into searches of a kind unwonted in a treatise on law. A great part of the matter detailed has been acquired by himself; but he has also been indebted for much of it to the kindness of friends conversant with those studies which the nature of the subject involves.

contract of location was unknown, but that after the captivity it was in use, having come into operation, along with other alterations of the Hebrew policy and usages, which, commencing at that epoch, operated during the after portion of Hebrew history.

Throughout the epoch when the Mosaic law was in strict observance, the lands, it may be deemed, were cultivated by the proprietors exclusively. Although the ancient Hebrews were so entirely an agricultural people, that agriculture was the foundation of their polity, no mention of cultivation by others than by the proprietors is made in the Pentateuch or the other more ancient Scriptures. Each Israelite possessed a portion of land inalienably.¹ The crop might be pledged, or sold for fifty successive years, but the proprietor himself continued to cultivate;² and the agricultural operations were performed by slaves or by hired day-labourers.³

There are three passages in the Old Testament Scriptures which at first sight may seem to derogate from this opinion, but, when examined, the first and second will be found to be confirmatory of it, and the third, although doubtful, not to be, certainly or effectively, adverse. The first of these passages is contained in the eleventh and twelfth verses of the Song of Solomon, chapter eight. "Solomon had a vineyard at Baalhamon; he let out the vineyard unto keepers; every one for the fruit thereof was to bring a thousand pieces of silver. My vineyard, which is mine, is before me: thou, O Solomon, must have a thousand, and those that keep the fruit thereof two hundred." An analysis of those verses proves that while the words used in the English translation are "let out the vineyard," it was not the contract of location which was signified, but the delivery of the vineyard to keepers, who were to sell the produce and bring to the proprietor a thousand pieces of silver, or, as the word is rendered in a parallel passage in Isaiah (vii. 23), "silverlings," which were shekels of silver. The supposition of a money rent for land, even supposing location to have been known, would be at variance with the rural economy and the usages of the East. Where there was location it was to the colonus partarius, who delivered a produce rent. The words of the twelfth verse show that out of the price of the produce the royal proprietor was to have the thousand silverlings, and to give two hundred to those that "keep the fruit," obviously, not as having a share of the rent, but as the wages of labour. For, in no country or age, could

Cultivation
of land under
Mosaic law.

Song of
Solomon,
viii, 11, 12.

¹ Michaelis on the Law of Moses (Smith's Transl.), vol. i. pp. 221, 237, and 261.

² Michaelis, vol. i. pp. 378-9.

³ Michaelis, vol. ii. p. 165, *et seq.* and pp. 186-91.

there have existed so great a disproportion between the amount of rent and the joint amount of the wages of labour and of the profits of working capital however rude or defective.

Isaiah, vii.
23.

The second passage to which reference has been made is in the twenty-third verse of the seventh chapter of Isaiah. The words are, "And it shall come to pass in that day that every place [4] shall be, where there were a thousand vines at a thousand silverlings, it shall even be for briars and thorns." These words themselves prove nothing except the existence of the vines and their value, for they nowise indicate on what principle the cultivation was conducted. But effect has been given to them by identifying their meaning with that of the passage of the Song of Solomon. Even assuming the identity, the words can afford no separate evidence, but must be governed by the construction which is to be put on that passage.

? Sam. ix.
10, 11, and
xvi. 3, 4.

The third of the supposed adverse passages is contained in II. Samuel¹, ix. 10, 11, and xvi. 3, 4.¹ These passages gave rise to an opinion that there was among the agricultural laws of the ancient Hebrews a rule which authorised the owner of extensive estates to grant hereditary leases on condition that the grantee should cultivate the land and pay to the proprietor a portion of the produce. The meaning of these passages has been discussed by two jurists of high authority, both deeply versed in Hebrew learning. Selden in his Treatise² "*De Successionibus ad Leges Ebræorum in Bona Defunctorum*," enters into an examination of their import, not in a dissertation on the law of location, but in one *De Successione Fisci seu hereditibus morte damnatorum*. Selden puts the case that the division of the lands may have been "*seu in communi dividundo, ubi uterque æque rei possessus est dominus partiarius; aut minus proprie, veluti si verba fiant de domino et usu fructuario, de domino et colono, emphyteuta, sive aliis ejusmodi*,"—and he comes to the conclusion that the judgment of David was "*Etiam decrevi pridem, dixi, pronuntiavi te et Zibam servum tuum partiarios fore. Te ut dominum cui, utpote in integrum restituto,*

¹ The verses are "Thou (Ziba) therefore, and thy sons, and thy servants, shall till the land for him, and thou shalt bring in the fruits, that thy master's son may have food to eat; but Mephibosheth, thy master's son, shall eat bread alway at my table. Now Ziba had fifteen sons and twenty servants. Then said Ziba unto the king, According to all that my lord the king hath commanded his servant, so shall thy servant do. As for Mephibosheth, said the king, he shall eat at my table as one of the king's sons."

"And the king said, And where is thy master's son? and Ziba said unto the king, Behold he abideth at Jerusalem; for he said, To-day shall the house of Israel restore me the kingdom of my father. Then said the king to Ziba, Thine are all that pertained unto Mephibosheth. And Ziba said, I humbly beseech thee, that I may find grace in thy sight, my lord, O king."

² Selden's Treatise *De Successionibus ad Leges Ebræorum in Bona Defunctorum*, cap. xxv. pp. 89, 90.

subministrantur agrorum proventus, illum ut colonum glebæ adscriptitium, servum agros colentem atque inde etiam pro hominis statu victum capientem." He thus deems that the tenure was by hereditary lease, Ziba being *colonus partiaris*, from which example he arrives at the position that such leases were in accordance with the recognised rule of law.

The opinion that there were such leases amongst the Hebrews is [5] strongly opposed by Michaelis.¹ After having stated that it is entirely founded on the passages of Scriptures now cited, he examines their purport, holds that by the division the land was given to Ziba in full property, and concludes by the broad position that he therefore considers what has been asserted concerning the hereditary leasing of lands as entirely unfounded and destitute of proof. Although he does not name Selden, it is probable that he was one of the authors against whom his arguments are directed. While it may be presumptuous to indicate an opinion where jurists of such eminence differ, the opinion of Michaelis may be deemed to be the more sound, because more in accordance with the general tenor of land-rights among the Jews. This antagonistic result Selden attempts to surmount by a train of reasoning which has a strong appearance of hypothesis.

Even if the opinion of Selden were correct as to the particular case of Mephibosheth and Ziba, it could establish a peculiar and isolated instance, and not a rule or usage. A strong doubt at least of the opinion of Selden that such was the rule is indicated by the terms in which he discusses the doctrine of "Defuncti Bona," which formed the subject of succession among the Hebrews. He enumerates "Fundos," "Nomina," debts personal and secured on the land, and corporeal moveable subjects.² But he makes no mention of lands held by hereditary lease. These lands, doubtless, he may have included under the word "Fundos," and so have identified them with lands held in full property. Nor, although such a tenure had been known, its hereditary nature characterising it as so nearly approaching to property, could it be held to prove that the contract of location was in operation in an ordinary sense and formed a common mode of cultivation.

In his great work *De Jure Naturali et Gentium, Juxta Disciplinam Ebræorum*, Selden does not directly treat of the contract of location as existing among the Hebrews; but, incidentally, while discussing certain distinctions made in the law of theft, he uses phraseology inherent in the law of location. The question more immediately examined is, whether those who were actual

¹ Mich. vol. i. p. 416 *et seq.*

² Selden, *De Successionibus*, cap. i. p. 1; cap. vi. p. 26.

labourers, as vine-dressers or as woodsmen, were entitled, in the course of their labours, to gather fruits, without being guilty of theft.¹ He uses the words "colonus," "locatio," and "conductus." In one passage,² he makes reference both to the Old and the New Testament Scriptures, but in another he refers to the Gemara and to Maimonides, which shews that he had in view the later periods of the Hebrew nation when leases were recognised; and it is probable, from these references, that his phraseology had been materially affected by [6] Talmudic influences. Although doubts may, therefore, hang over the certainty and precision of the opinion of Selden as to the existence of leases in their ordinary sense under the strict Mosaic law, the negative evidence is strong, while the positive is ambiguous.

Throughout his full and precise commentaries on the Laws of Moses, Michaelis, as already indicated, is decidedly of opinion that, under the strictly Mosaic economy, leases were unknown, and that the lands were cultivated directly by the proprietors.³

Later Hebrew system of cultivation

But a change in the rural economy and agricultural laws of the Hebrew nation appears in a later period of its history. Without attempting even an approximation to the precise date, it may be deemed that the change arose after the return from the Babylonish captivity.

Holy Scripture itself embodies the most remarkable and most important, as well as the most authoritative, evidence of that change. While the Divine Author of the Parables of the New Testament Scriptures had for his object the inculcation of spiritual truths, the materials through the medium of which those truths were imparted were supplied by the physical objects around, and by the institutions, usages, and manners of the nation. This, shewn intrinsically by Scripture itself, is assumed as the basis of the parabolic discourses by the most eminent commentators,⁴ who, in dealing with the texts, treat them with reference to objects purely human, as if they related to real scenes and transactions.

The most direct evidence of the existence of the contract of

¹ Selden, *De Jure Naturali et Gentium*, liber vi. cap. ii. pp. 670, 672.

² P. 670.

³ In the subsequent portions of this chapter there will, notwithstanding its high authority, be no recourse to the Commentary of Michaelis; for he himself says "that I have nothing to do with the laws of the present Jews, or of those who have lived since the Babylonish captivity. (Michaelis, vol. i. p. 62.)

⁴ Lightfoot *Homæ Hebraicæ*; Grotius, *Annotationes in Libros Evangelorum*; Horne's *Introduction to the Holy Scriptures*; Gresswell's *Exposition of the Parables*; Trench on the Parables; Stier's *Words of the Lord Jesus*; Alford's *Notes on the Greek Testament*; Stennet, *Introduction to the Parable of the Sower*; and Kitto in his *Illustrated Commentary*.

location is embodied in what is ordinarily styled by commentators the parable of the "Wicked Husbandmen." The xxi. chapter of St Matthew, verses 33 and 34, bear—"Hear another parable. There was a certain householder which planted a vineyard, and hedged it round about, and digged a wine-press in it, and built a tower, and let it out to husbandmen, and went into a far country; and when the time of the fruit drew near, he sent his servants to the husbandmen that they might receive the fruits of it." In the xii. chapter of St Mark, verses 1 and 2, and in the xx. chapter of St Luke, verses 9 and 10, there are parallel passages, which need not be cited, as there is no material variance. In these verses the most important words are "let it out to husbandmen," which in Greek are *καὶ ἐξέδωκε αὐτὸν γεωργοῖς*. According to the received English translation [7] the words literally signify the contract of location as known in phraseology strictly technical. The same words are used in other noted English translations—as in the translation from the Genevese adopted by the General Assembly of the Church of Scotland in an early period after the Reformation,¹ and in the translation from that made by Theodore Beza.² And in the ancient English translation made by Wycliffe and his followers³ from the Vulgate, the words used in St Matthew are "and hired it, or set ite to ferme (*sic in origine*), to erthe tilliers;" in St Mark, "hired ite to erthe tilliers;" and in St Luke, "settite it to forme to tillieris." In the foreign translations the same technical phraseology is used: in the Latin (Vulgate), "et locavit eam agricolis;" in the Spanish, "y la dio a renta a unos labradores;" in the Italian, "poi alloga quella a certi lavotori;" and in the French "puis il la loua a des vigneron." ⁴ This concurrence in the import of the words, which is in rigid accordance with the best Lexicons, fixes the signification by a series of independent authorities.

The existence of the contract of location, as embodied in these texts, is recognised by the most noted commentators. In the *Cen-
turia Chorographica* Mattheo premissa and in the *Horæ Hebraicæ* of Lightfoot (which are commentaries on the Evangelists, and of

Commenta-
tors:
Ancient.

¹ This translation is dedicated to James VI., King of Scotland, by the Commissioners of the Kirkes of his Realm, in 1579.

² "Englished by Thompson," and printed at Edinburgh by Andrew Hart, Anno Dom. 1610. Cum Privilegio Regiæ Majestatis.

³ Edited by Marshall and Nadin.

⁴ Bagster's Polyglott Bible. The Spanish translation by Padre Scio is

from the Vulgate, but the Italian and French translations are independent of it. The Italian is by Diodati, who was a Protestant and a member of the Synod of Dort. It is made from the original text, to which it adheres with great fidelity. The French translation is by Ostervald, a pastor of Neuchâtel, and is made from the Geneva Bible. Bagster's Bible of Every Land, under the appropriate articles.

high authority), no express opinion has been traced, but there are passages in which the existence of the contract is clearly exhibited. From a short discussion contained in the former relative to the cultivation of land and the management of vineyards and tithes, its existence may be elicited.¹ In the latter, in his commentary on the governing words, he cites a passage from Maimonides on hirings of which the import is clear, and also in his discussion of the parable of the "Unjust Steward," St Luke, cap. xvi. verses 1 *et sequen.* he refers to a passage in the Mischna, uses the word "in elocandis agris," and he mentions the portions of the produce which, in different cases, were stipulated between the proprietor and the husbandman.² Grotius, in his Commentary on Matthew,³ gives his high authority in direct terms to the existence of the contract of location by saying, "certa fructuum pactione quod genus colonos Romani partiaros vocant;" and he confirms the meaning of the words "let it out" by [8] those which follow, in verse 34th (given in the original language), that he might receive the fruits thereof, being the portion of the produce rendered to the landlord by the colonus partiarus.

Modern.
Commenta-
tors.

Modern commentators have adopted the same view. Horne gives a clear and decided opinion. "Although," he writes, "the Scriptures do not furnish us with any *details* respecting the state of agriculture in Judea, yet we may collect from various passages many interesting hints that would enable us to form a tolerably correct idea of the high state of its cultivation. From the parable of the 'Vineyard let forth to Husbandmen' (Matt. xxi. 33, 34), we learn that rents of land were paid by part of the produce, a mode of payment formerly practised by the Romans, which anciently obtained in this country, and which is still practised by the Italians."⁴ Gresswell, in treating of the parable of the "Wicked Husbandmen," after having given details of the formation of the vineyard, says, "the relation henceforward subsisting between the persons concerned in the parable is, consequently, that of principal and subordinate, because it is that of the landlord and the tenant of one and the same property in land." He then shortly discusses the relation between landlord and tenant, embodying the recognised stipulations, and concludes, "Whether the returns which the tenant shall be bound to render to the landlord should be paid in money or in kind, must depend on the nature of their agreement. In either case the returns must be rendered and received as the rent of the vineyard;

¹ Lightfooti Opera Omnia, tom. ii. p. 239, 240.

² Grotii Annot. in Evan. p. 357.

³ Horne's Introd. to the Scriptures 10th ed., vol. iii. p. 491.

⁴ Lightfooti Opera, tom. ii. pp. 542-3.

and that the time when the vineyards ripen their fruits seems to have been that expressly appropriated by landlords to a reckoning with their tenants."¹ Stier is of the same opinion. He thinks—whether, in the metaphor, the *agidoro*, which is the same in all the three Evangelists, means to let out for rent in money (Cant. viii. 11; Is. vii. 23) or for a return in fruit (like the Roman *partiaris*) matters little.² Alford deems that the letting out to husbandmen was probably that kind of letting where the tenant pays his rent in kind, although the *kapros* may be understood of money.³ Although the theory of these commentators that money-rent for land was known, is at variance with the usages of the East, yet that theory does not derogate from their opinion of the nature of the transaction, but rather enhances it, as proving that [9] they identify it with the known stipulations of the contract of location. Trench says, "having thus richly supplied his vineyard with all things needful, he let it out to husbandmen; it is not said on what terms, although there was no doubt a covenant betwixt him and them concerning the proportion of the fruits which they should yield in their season."⁴ In a subsequent passage he says "*that the servants are sent to receive of the fruits of the vineyard*" the householder's share of the produce, whatever that might have been—the rent not being paid in money but in a fixed proportion of the produce; and in a note he explains and supports his opinion by a reference to the well-known Metayer system, and the *coloni partiaris* of the Roman law. Kitto,⁵ while discussing the parable of the "Unjust Steward," but without referring to that of the "Wicked Husbandmen," introduces a short, but precise, dissertation on the contract of lease as known to the Hebrews. He maintains that leases existed among them conformably to the Metayer and Ryot system of cultivation; but his views are, to a great extent, founded on the well-known prevalence of that system in the East. He refers more specially, however, to the Talmud and the Talmudists as showing that among the Hebrews one-third or even one-half were usual proportions of the produce payable to the owner of the land as rent.

These views of commentators are confirmed by the views of the Talmud. Rabbis as expounded in the Talmud, combined with the treatises of those authors who are styled the Talmudists.⁶

¹ Gresswell's Expos. of Parables, vol. v. pp. 10-12.

² The Words of the Lord Jesus, by Stier (Clark's Foreign Theological Library, vol. iii. p. 117).

³ Alford's Commentary, 3d ed. vol. i. p. 198.

⁴ Trench, Notes on the Parables, 8th

ed., pp. 196-198.

⁵ Kitto's Illustrated Commentary on the Old and New Testaments, vol. v. pp. 112-114.

⁶ The Old and New Testament connected in the History of the Jews and Neighbouring Nations from the Declension of the Kingdom of Israel and Judea

Gemara.

Two important passages are inserted by Lightfoot in his "Horsæ Hebraicæ." The first in his commentary on the parable of the [10] "Unjust Steward," and to it a short reference has been already made. The matter embodied in it is from the Gemara. In so far as it appears from it there is not in the Gemara any direct discussion of the contract of location, but there is a clear and strong incidental notice of it under the title "Demai," or as it is translated "De Re Dubia." The import of this title is a dissertation on the cases in which tithes should be given, or not. The words of Lightfoot are, "Respicere videtur hæc parabola morem istum in elocandis agris de quo agitur—Demai, cap. vi.—Ubi supponitur agrum elocatum esse a Domino alicui sub hac conditione, ut solvat agricola frugum vel partem dimidiam vel tertiam vel quartam, prout conventum inter eos fuerit, de proportionibus aut quantitate. Sic etiam de oliveto iisdem conditionibus elocato. Et disputatur ibi, de solutione decimarum, quonam modo componenda inter possessorum et agricolam."¹

Maimonides.

The second passage (likewise already referred to) is a commentary on the words "let it out to husbandmen." It is Maimon. (Maimonides) in Sekiroth,² cap. ii. "Qui vineam suam elocat custodi. Sive ut *מאגרי* sive ut custodituro gratis, ineatque cum eo pactum, ut eam fodiat, amputet, pastinet sumptu suo; is autem negligat, atque ita non faciat, reus est, ac si propria manu vineam vastaret."³ There is some ambiguity in this passage; but its general purport and the use of the words "let" and "husbandmen" appear to identify it with the contract of location. This is confirmed by the nature of the subject-matter. The meaning of the Hebrew word of which the chapter in Maimonides treats, is "hirings."⁴ Doctrine relative to location was therefore appropriately introduced, and the passage itself shews that the hiring was that of land, not of services. In commenting upon the Mischna

to the time of Christ. M'Caul's Account of the Rabbinical Authorities prefixed to Prideaux, pp. xxxvi.-ix. Godwin's Moses and Aaron seu civiles et Ecclesiastici Ritus antiquorum Hebræorum, p. 369, note 6th. Lewis's Origines Hebrae, vol. iv. pp. 178-80. Lightfooti Opera, tom. i. p. 197. Porta Mosis seu Maimonidis Dissert. (by Pococke), p. 80, et seq. and p. 108 et seq. Access to the books of rabbinical learning is difficult. If a translation of the whole Talmud exists, it is not to be found in the great public libraries of Scotland. There is in the Libraries of the Universities of Edinburgh and Glasgow a Latin translation of the Mischna which shall be

particularly noticed hereafter. There are in those Libraries Latin translations of different treatises of Maimonides which the author consulted, but in which he could trace no information available to him.

¹ Lightfooti Opera, tom. ii. p. 542.

² The Hebrew word is *מְכִירָת*, and with the points *מְכִירָת*. The English orthography is that given in the text. There are in the original text words in Hebrew and Greek which have been omitted in the quotation, as the Latin may be deemed to be a paraphrastic translation.

³ Lightfooti Opera, tom. ii. p. 451.

⁴ Gesenii Lexicon in hac voce.

Maimonides recognises the location of land as a part of the Hebrew law, which corroborates the position that it is of such location that he here speaks.

The existence of the contract of location among the Hebrews is ^{Mischna.} ascertained from passages in the Mischna.¹ There is not in that book an avowed and specific discussion of the subject, but that location formed a portion of the Hebrew law and practice is to be learned from it indirectly. The notices, as in the Gemara, are [11] under the title *De Re Dubia*, being, as there, a *Tractatus*, or *An Examination of the Doubtful Cases relative to Tithes*. There is nothing in the discussion even to indicate whether the lease was written or verbal, or what was its form, or what were the stipulations beyond the covenant of rent, but it is pervaded by phraseology which places the recognition of location beyond doubt. *First*, Mention is made of "locator" and "conductor;" *secondly*, The latter, it is said, receives the land under the condition that he shall pay the rent, "mercedem," to the proprietor who is styled the "possessor" of the "Dominus Fundi;" *thirdly*, That the rent shall be paid out of the fruits; *fourthly*, That he who receives the land cultivate it, and pay to the proprietor a certain part of the fruits, as a half, a third, or a fourth, as he shall have agreed on or contracted; and, *fifthly*, There are apparently certain differences in the cases where either of the parties to the contract is an Israelite, or alien, or Gentile, and where the conductor is a priest or Levite.²

Although no direct discussion of the contract of location is to be found in the Mischna, it is to be deemed that such a tract does exist in the books of the Rabbis. In the Gemara there is a portion entitled "Order, Zeriam, Seeds," which among other tracts contains "Peah, the corner of a field."³ In the Mischna of Surenhusius, one of the commentators cited, Guisius, says, "Diximus supra ad peah, v. 5 de variis colonorum apud Judæos generibus."⁴ The existence of such a tract affords decisive evidence of the prevalence in Judea

¹ The following is the title of the translation of the Mischna consulted by the author:—"Mischna sive Totius Hebræorum juris, rituum, Antiquitatum ac Legum Oralium, Systema, cum Clarissimorum Rabbīnorum, Maimonidis et Bartenoræ commentariis integris, quibus accedunt Variorum auctorum notæ ac versiones, in eos quos ediderunt codices Latinitate donavit et illustravit Gulielmus Surenhusius. Amsteldami, 1698." Surenhusius was a Professor of Hebrew at Amsterdam.—Watt's Bibliotheca Brit-

tannica.

² Para. I. of the Mischna, pp. 97-98.

³ M'Caul's Account of the Rabbinical Authorities prefixed to Prideaux, p. xxxvii.

⁴ Mischna, p. 97. The author has been unable to trace any indication of this tract, or even to ascertain who Guisius was; but it is probable that he was a Belgian or German deeply versant in Rabbinical learning, from the importance which Surenhusius appears to attach to his commentaries.

of cultivation by coloni or tenants possessing distinctive characters thoroughly recognised.

Parable of
Labourers,
Matt. xx.

Were confirmation of these positions needed, it would be given by the contrast which, in important particulars, is presented by the parable of the "Labourers in the Vineyard," St Matthew, chap. xx. verses 1-16. In the parable of the "Wicked Husbandmen," the proprietor having let his lands goes to a distant country, and sends to his tenants for his rents. In the present parable there is a representation of a vineyard, cultivated by a householder or resident proprietor under his own immediate care, and by means of hired labourers. The word used in the former parable is *γεωργος*, agricola, husbandman, but in the present parable the word is *οργανος*, operarius, labourer, showing a marked distinction between the two classes of persons, as well known in Judea as it is in this country. This contrast between the parables is easily to be gathered from the tenor of the commentaries of eminent writers.¹

Were there
written
leases among
the Heb-
rews?
Luke, xvi.
1-13.
Unjust
Steward.

[12] While the existence of the contract of location among the Hebrews may be deemed to be certain, there are grave doubts whether it was verbal merely, or had assumed a written form. The parable, ordinarily called that of the "Unjust Steward," contained in the xvi. chapter of St. Luke, verses 1-13, has been considered by commentators as embodying evidence that there was a regular written contract. This doctrine is founded on the position that the debtors of the "rich man" were tenants under the immediate superintendence of his steward, and that the writings with which they and the steward tampered were their leases. The verses which demand consideration are, (5th) "So he called every one of his lord's debtors unto him and said unto the first, How much owest thou unto my lord? (6th) And he said, An hundred measures of oil. And he said unto him, Take thy bill, and sit down quickly, and write fifty. (7th) Then said he to another, And how much owest thou? And he said, An hundred measures of wheat. And he said unto him, Take thy bill, and write fourscore."

In examining this subject, there are three questions which require consideration, but which are much complicated, as the solution of all depends much on the solution of each, and on their mutual relation. Those questions are, *first*, Whether the steward was an officer having the management or superintendence of the land of his master? *secondly*, What is the signification of the word "debtor?" and, *thirdly*, What is the meaning of the word which is rendered "bill" in the received English translation?

¹ Grotius, Creswell, Alford, Trench.

1. The Greek word, the import of which is to be ascertained, is *οἰκονόμος*. This word is rendered "steward" in the translations of Genevieve and of Beza, as well as in the ordinary translation. In Wycliffe's Bible it is rendered "fermarr," and also "bailie." In the Vulgate, it is "villicus," who, according to Ducange,¹ was the person who managed the land of lay proprietors, to whom he stood in the same relation as the "economicus" did to ecclesiastics. The words used in the continental translations have a similar meaning. Lightfoot translates the word "economicus," and he obviously holds him to have been the land-steward, saying "versaus hic œconomus inter agricolas solum;" and he deals with the words of the first verse of the parable "*ὁ δὲ εἶχεν οἰκονόμους*" with reference to the letting of land "in elocandis agris."² Grotius is apparently inclined to use the word when translated "villicus" in preference to the meaning embodied in the term "dispensator;" but he does not state with precision what he deems to be its meaning.³ The modern commentators differ somewhat as to the exact character and duties of the officer. Alford styles him "a general overlooker," [13] very much what we understand by an *agent* or a "man of business," or in the larger sense as "steward."⁴ Kitto explicitly holds him to have had the management of the land, and of those who, according to his view, were the tenants.⁵ Trench deems that neither "villicus" nor "dispensator" is a proper translation, but that "procurator would be the best, and that he was not a land-bailiff merely, but a ruler over all his master's goods."⁶ Gresswell gives a full and learned dissertation on the import of the Greek word, and holds that "the stewards of the gospel parables correspond most properly to the description of a general manager or superintendent or governor of a family under the master, to whom not only his property was committed in trust, but all orders of persons in his household were subject; and that in his delegated capacity he possessed authority over all his master's property whether in the town or country."⁷ Whether the word is to be interpreted in the larger or more restricted sense is immaterial, for it is evident that, according to either, the management of the land and its inhabitants was committed to him. In this capacity it was the steward's duty to transact with the tenants, if such the debtors of his master were.

¹ Ducange, vol. iii. p. 1336.

² Lightfoot's *Opera*, tom. ii. pp. 543 and 543.

³ Grotius, *Annot. Evan.* p. 757.

⁴ Alford, p. 536.

⁵ Kitto's *Illustrated Commentary*, p. 112.

⁶ Trench on the *Parables*, 424.

⁷ Gresswell on the *Parables*, vol. iv. pp. 2-15.

Parable of
Unjust
Steward—
continued.

2. There is much difference of opinion as to the character of the persons described as debtors; the words *χρεωφιλισταὶ τοῦ κυρίου αὐτοῦ* certainly signify the debtors of his lord or master, the word debtors being used in its most common acceptation. Nothing, therefore, can be learned from the word itself, and when considered along with the context, three different meanings have been given to it: *first*, it has been deemed that it is to be taken in the ordinary sense of persons who were owing to the rich man; *secondly*, that they were contractors to furnish the establishment with articles of domestic consumption; and *thirdly*, that they were tenants possessing under written leases.

The first meaning cannot easily be reconciled with the context; for they were debtors for certain portions of produce, as wheat and oil. Assuming that the rich man cultivated his land by bondmen or hired servants, and sold the produce, the debt would have been due to him in money, which from a very early period of the Hebrew nation formed the medium of exchange, and at the time which the parable involves was undoubtedly in full operation. A debt consisting of certain quantities of wheat and oil is an untenable hypothesis; nor will it accord with the context to assume that the value, and not the commodity itself, was meant, for it was the amounts of the actual produce due by them with which the debtors were to tamper. Stier indeed holds they were "debtors for produce furnished and not paid for;"¹ but he neither gives his reason nor [14] attempts to reconcile this import with the context or the known commercial usages. Alford deems that the commodities had been *borrowed*,² which he paraphrases that the debtors had not yet paid for these articles of food out of the stores of the rich man. But this appears to be a forced construction, for there is no reason to think that the rich man lent commodities which were to be returned in kind and the paraphrastic import given resolves itself into a sale. Trench adopts a similar hypothesis, but which he defends more skillfully. He regards them as merchants or other factors who had made large purchases of commodities from the steward; that they had not yet made their payments, but that they had given their bills or notes of hand, acknowledging the amount which they had received, and in which amount they owned themselves to stand indebted to him;³ and that these bills or notes were the documents which the steward returned to them in order that they might alter the sum due to one of a less amount. But the validity of this theory depends entirely on the fact that the document was of the

¹ Stier, vol. iv. p. 179.

² Alford, vol. i. p. 537.

³ Trench, p. 429.

haracter described; and while this may have been so, that import does not necessarily or explicitly arise from the word used in the original language, and is at variance with the opinion of the other commentators, of whom some hold it to be a contract of supply and others a lease. The opinion of Stier and the reasons in support of it, although less detailed, are substantially the same as those of Trench, and consequently the same observations apply.¹

Parable of
Unjust
Steward—
continued.

A second hypothesis, that they were contractors for household supplies bound by specific written contracts is strongly and ingeniously maintained by Gresswell,² and Stier states that they were so deemed by the German commentators B. Stein and Grossman.³

Other commentators hold that they were tenants. Lightfoot, in a passage already cited from the *Horæ Hebraicæ*, obviously entertains that opinion. That view pervades his commentary on the first seven verses of the xvi. chapter of St Luke, in which, although he does not expressly name the persons with whom the steward deals, he describes them by characteristics and conditions which can be applicable on no other hypothesis.⁴ The authority of Lightfoot is so high that his opinion cannot be gainsayed but with great diffidence. Nothing explicit is said by Grotius.⁵ But when it is considered how strongly he holds that in the parable of the "Wicked Husbandmen" (*υπαγωγοι*), it may be supposed that he considered them to be tenants. Kitto in his commentary on verse fifth, "he called every one of his lord's debtors unto him," says "it is quite evident from the debts being stated to consist of corn and oil [15] that these 'debtors' were *tenants* of the steward's lord, and consequently that the transaction refers to the terms on which the corn-fields and olive-grounds were held. He then details the reasons of this opinion, and supports it by the intrinsic evidence of the passage and by references to oriental usages and the learning of the Talmudists.⁶

3. The third question is, Whether, assuming that they were tenants, did they hold by verbal location or by a formal written contract of lease? The solution of this question (if it can be satisfactorily solved) will depend upon the intrinsic evidence of the passage itself, combined with the intrinsic evidence of the existence, or probable existence, of such an instrument among the later Hebrews. The words of the sixth and seventh verses are *Διὰ τὴν*

¹ Stier, vol. iv. p. 179.

² Gresswell, vol. iv. pp. 20-22.

³ Stier, vol. iv. p. 179.

⁴ Lightfoot's Opera, tom. ii. p. 542.

⁵ Grot. Annot. p. 757.

⁶ Kitto's Illustrated Commentary, pp. 112, 113.

τὸ γράμμα. In the ordinary English translation these words are rendered "Take thy bill," and in the Anglo-Genevese translation, and in that from Beza, they are "Take thy writing," which is the known literal meaning of the word γράμμα. In Wycliffe's translation the words are in the sixth verse, "Taak thin obligacion," and in the seventh, "Taak thi lettres." In the Vulgate they are in the sixth verse "accipe cautionem tuam," and in the seventh "accipe tuas literas." In the Italian, "prende la tua scritta," in both verses. In the French in both verses, "Reprends ton billet." And in the Spanish in the sixth verse "Tomo tua escritura," and in the seventh verse "Tomo tua vale." It is difficult to reconcile the phraseology of these various translations; for in one of the phrases there is ambiguity, and as to another there are marked discrepancies between the several translations, and also between the rendering of the same word in the different verses.

In the English translations the words "Take thy bill" or "writing" are susceptible of a double meaning, either that the steward had the document, and that the debtor was to receive it from him, or that it was in the debtor's possession, and that he was to take it and deal with it as directed. It is in the latter sense in which the words are ordinarily understood by English readers. The Italian concurs with the English, and the Spanish word signifies either to take or receive. The Latin and the French explicitly mean that the document was given by the steward to the debtor.

A like, or even greater, difficulty attends the different translations of the word "γράμμα." The literal meaning of the word is merely "a writing," as rendered in the Anglo-Genevese translation and the English one from Beza, and in the Italian and in the Spanish under the sixth verse. But in Italian the word "scritta" and in Spanish the word "escritura" have a secondary meaning, that of an [16] instrument, obligation, or contract; and it is likely that in Spanish it was used in the latter sense, as the translation was made from the Vulgate. The word "bill" in the ordinary English translation is, in different passages of Scripture, used as importing a deed or solemn writing. And such is its import. According to Ducange, Billa is "sedula, libellus, syngraphum *Anglie* Bill vel Bille. Nos vulgo Billet dicimus."¹ As Ducange held office in France, the latter sentence shews that the word "billet" has, in the French translation, the same meaning as bill has in the English. The words "sedula" and "syngraphum" involve a meaning of so general a character that the precise nature of the document

¹ Ducange, tom. i. p. 555.

cannot be inferred from them. But as neither the English nor the French word is ordinarily used as signifying a lease, it may be deemed that the translators had not that contract in view. The word "cautio," used in the translation of the sixth verse in the Vulgate, is defined by Ducange to be "chirographum, quo debitor cavet se pecuniam creditore accepisse eamque certo die soluturum spondet, cujus formulam exhibet Marculfus, lib. ii. c. 25, 26, 27." The meaning of the word "vale" in the seventh verse of the Spanish translation is a bond or promissory note. In the translation by Wycliffe the words "obligacion and lettres" are of plain meaning, and a different word was probably used in each verse, as the translation of Wycliffe was made from the Vulgate, in which the same reading occurs. For what reason the same word in the original language is translated differently in the different verses, it is difficult to see; for there is nothing in the context which enjoins or warrants that in the seventh verse the word should have given to it a strictly technical meaning, and in the other should be translated by a word of ordinary import.

According to the phraseology used in the different translations, although some of the terms adopted may indicate writing or letters in a general sense, yet in the majority of the terms employed there is indicated the existence of a formal or technical writ, as a deed or instrument. Such formal writs were known in the later epochs of the history of the Hebrews. In Jeremiah, chap. xxxii. verses 6-25, the details are given of the execution of a written contract of sale which appears to have been made with much care and solemnity. And in the Apocryphal Book of Tobit, chapter vii. verse 14, mention is made of a written and sealed instrument or covenants. Although justly excluded by Protestants from the canon of Scripture, the Apocryphal Books have been admitted to afford evidence of the historical matter and the description of usages embodied in them. The subject of the contracts or covenants of the Hebrews is shortly discussed by Horne, Pareau, and Fleury.¹ [17] What, in the opinion of commentators, was the nature of the document, deed, or instrument in the parable under consideration depends upon the view which each commentator has of the nature of the transaction, as to which material differences have been shewn.

¹ Horne's Introduction, vol. iii. p. 213. *Antiquitas Hebraica Breviter descripta a Joanne Henrico Pareau, part iii. sec. 3, cap. 3. The Manners of the Ancient Israelites by Fleury, Abbé of Argentuil, translated by Adam Clark, 4th ed. pp. 168-9. Pareau, De Foderibus et Contractibus, pp. 322-5.*

In treating of Testaments, Jahn in his *Biblical Antiquities*, translated by Upham, says "that at a recent period the will was made out in writing." Reference is made to Ward's *Library of Standard Divinity*, vol. ii. p. 76 of Jahn's *Biblical Antiquities*.

Lightfoot, in commenting on the words "take thy writing," verso sixth, writes "Accipe a me schedulam contractus tui quam mihi tradidisti, et cito scribe novam, de quinquaginta tantum Batis debitis," etc.¹ The phraseology "schedalum contractus tui" is too general even to indicate the precise nature of the deed or instrument which this eminent commentator deemed to have been meant. But as the tenor of his comment shews that he considers the debtors to have been tenants, it is a legitimate inference that he regarded it as the contract of lease. Grotius discusses the nature of the writing. He balances between the correctness of the word "cautio" and that of the word "litera," and it is difficult to know which he prefers, but he appears to lean in favour of the latter.² This opinion it is difficult to reconcile with his holding that the debtors were tenants, as the word "cautio" cannot well be construed as including a lease. The word "litera" from its generality might include such a document, but neither view impairs the *dictum* of Grotius of the existence of the contract of location, for the former would merely indicate that tenant is not the character in which the debtor is to be regarded. The opinions of the modern commentators are conformable to their respective theories of the character of the debtors. Gresswell deems that the writing was a contract for household supplies. Trench is clear that the document was a bill or note of hand, holds that by the Vulgate it is happily translated "cautio," and supports his opinion by a parallelism indicating that the word *קדמונה* is used elsewhere in Scripture in an equivalent sense;³ and the view of Steir is similar.⁴ Alford considers the document to have been a bond,⁵ which, according to his theory, must have been an obligation to return the same quantity of the commodity which the debtor had borrowed. And Kitto's hypothesis binds him to the conviction that the document was a lease.⁶ Nothing is said by Grotius as to whether the steward or the debtor was the custodian of the document. Lightfoot, Trench, Alford, and Steir, hold that the document was in the possession of the steward, and the same result is involved in the opinion of Kitto.⁷ Gresswell [18] alone appears to deem that the documents were in the possession of the debtors themselves.⁸

¹ Lightfooti Opera, tom. ii. p. 543.

² Grotius, Annot. 757.

³ Trench, p. 439.

⁴ Steir, vol. iv. p. 179.

⁵ Alford, 538-9.

⁶ Kitto, 112-13.

⁷ Vide those commentators, *ut supra*.

⁸ Gresswell, iv. p. 27. In dealing with the parable as if it were a real transaction, a question of some interest

and curiosity emerges.—In what way were the debtors to falsify the documents so as to hope to escape detection? An attempt to solve the question would involve a detailed discussion, which would be extrinsic, as the subject-matter would consist of the nature of the materials and instruments used in writing and the modes of using them; but a reference shall be made to the

The result of the preceding details appears to be, that while there is clear and strong evidence of the existence of the lease, regarded simply as the contract of location, its existence in a written form is very doubtful, and that, with the exception of the stipulation as to rent, the tenor and conditions are unknown.

At what precise time the contract of location of land was introduced among the Hebrews and whence it was derived, are questions which do not appear to admit of a satisfactory solution. As already indicated, there is a high probability that this mode of cultivation began to have place some time after the return of the Jews from the Babylonish captivity. An earlier date cannot be assigned, as there is preponderating evidence that it did not exist under the Mosaic institutions, which, although relaxed previously to the Captivity, still remained as a whole effective even in economical details. No specific information has been traced either as to the time of the introduction of location or the land or the people whence it was derived. An hypothesis, therefore, is all which can be formed; and it may approach to probability. But, as it must be constructed on a series of conjectures, an attempt to give accurate details would be cumbrous, and might prove delusive. The hypothesis is, that the Hebrews obtained their knowledge of the doctrines and practice of location during their long captivity in Babylon, and convinced of its beneficial results, adopted the system on their return to their native land. The skill and industry of the ancient Hebrews are deemed to have been acquired in Egypt, and their sojourn in Babylon may well have made valuable additions to their knowledge of rural economy. Babylon was one of those states of antiquity which excelled in the arts of agriculture, as the cultivation of the soil formed the most important business and was the chief source of wealth and power.¹ Although there is not any direct or explicit evidence of the existence of location in the countries of the East where the captive Hebrews lived, yet there is the strongest reason to believe that [19] it did there exist. The system of cultivation by participation in the produce between the proprietor and tenant, is well known to prevail among Eastern nations. The territories of modern Persia resemble closely those of the land of

Origin of
location of
land among
the Heb-
rewn.

passages which contain the necessary information, and from an examination of which a solution of the question may be conjectured. Jahn's *Biblical Antiquities*, p. 44, *et seq.* Horne's *Introduction*, vol. iii. pp. 507-12. Lewis's *Origines Hebraeae*, vol. iv. pp. 125-33. Godwin's *Moses and Aaron*, p. 511, *et*

seq. The subsequent part of the parable indicates that the fraud had been detected by the "Rich Man," but whether from inspection of the documents or otherwise does not appear.

¹ Jahn's *Biblical Antiquities*, p. 33, *et seq.*

the Captivity, and Chardin, in his noted Travels, gives a detailed account of the prevalence of the system there, in his chapter "*Des Fonds de terre et des Rentes*."¹

The Raiat Rents in Turkey,² and cultivation according to a similar system in Hindostan under the name of Ryot or Raiat,³ are examples of this ancient and oriental tenure. In ancient Greece and Rome the same system was in operation.⁴ When the unchanging character of oriental institutions is considered, it may well be deemed that this mode of cultivation existed at the time of the Babylonish captivity, and that it prevailed throughout the territories of Assyria and Media and the adjacent lands, where were the habitations of the Hebrews.

Captivity in
Babylon.

Although there is no full or definite information as to the condition of the Hebrews during their captivity, yet there are passages in which it is indicated. In different parts of sacred Scripture, but more especially in the third and eighth chapters of the Book of Esther, there is evidence that the Hebrews resided throughout the different provinces of the empire. They had therefore full means and opportunity of becoming acquainted with its usages, including its rural economy. Although they were captives, the condition of the Hebrews was far from being abject. They held high place at court, and as is implied in a passage of the Apocrypha,⁵ and as a tradition of the Jews affirms,⁶ they had a prince and magistrates from their own number. They were probably treated as respectable colonists, enjoying the peculiar protection of the sovereign.⁷ Although the Hebrews appeared to have been in better condition in Media than in Assyria,⁸ yet, if they did experience ill-treatment, it was supposed to have been of short duration.⁹ Thus they were in a position in which they could make themselves thoroughly acquainted with the prevalent system of rural economy and the

¹ Voyages De Chardin en Perse et Autres Lieux De L'Orient, edition par Langlès, vol. v. pp. 380-93. Fraser's Khorassan, pp. 173, 208, 390. Jones' Essay on the Distribution of Wealth and the Sources of Taxation, p. 116.

² Jones, pp. 127-31.

³ Husbandry of Bengal (anonymous, but understood to be by Colebrook), p. 51, *et seq.* Colebrook's Dig. of Hindoo Law, vol. i. p. 460. Jones, pp. 113-18. Report of the Select Committee of the House of Commons on the Colonization and Settlement of India in 1859 (Minutes of Evidence, pp. 46-73, 110 and 159).

⁴ Of this fact, as well as the prevalence of the Metayer system in the

Middle Ages, ample evidence will be given in the subsequent chapters of this introductory dissertation. The author is aware that there is a difference in one important particular between the Metayer and the Ryot system, much to the disadvantage of the latter, but the distinction does not affect the position assumed in the present discussion.

⁵ History of Susannah, verse 5th.

⁶ Jahn's History of the Hebrew Commonwealth (translated by Stowe), vol. i. pp. 161-63. Horne's Introduction, vol. iii. pp. 120-1.

⁷ Jahn, *ut sup.*

⁸ Book of Tobit, chap. xiv. ver. 12-13. Jahn and Horne, *ut sup.*

⁹ Jahn, *ut sup.*

[20] ease and advantage which it conferred on the proprietors of the land.

When the Hebrews returned to their native land, they found a large territory suited for the practice of the mode of cultivation which had been imparted unto them. Authors are agreed as to the fertility of the Holy Land, and the variety of its productions;¹ and important details have been preserved. Josephus has recorded a valuable fragment of Hecateus the Abderite, whom he describes as "vir philosophus simul et circa actiones industrius." The words of Josephus are, "Idem vir (Hecateus) et magnitudinem provincie quam incolimus, pulchritudinemque narravit. Pene decies trecenta millia, inquit, jugera terrarum optimarum uberrimae provincie possidere noscuntur. Judea namque hujus est amplitudinis."² The word rendered "juga" is in Greek *αρουρα*, and modern authors use the word "arura" when they make mention of the passage.³ The arura appears to have been less than the juga. But it has been satisfactorily shown that the passage in Hecateus obviously "relates only to the ploughed lands of the Jews, and those that were most fruitful," and that, independently of a very large extent of arable land of an inferior quality, there were vineyards, olive, and other plantations, and pastures, of which they have had a large amount for the maintenance of their numerous herds and flocks."⁴ On their return from captivity the Hebrews betook themselves to "rebuild their houses and again manure their lands."⁵ There is no record of the distribution of the property in land either immediately after the return from the Captivity, or at any subsequent period of the Hebrew Commonwealth. Although adverse to the Mosaic institutions and to the usages of early times, there is abundant evidence, during the era which the New Testament Scriptures include, of the accumulation of property in land, and the consequent creation of a class of great proprietors. In numerous passages,⁶ there is mention made of men who were rich, and had great possessions. Although there was doubtless wealth of various kinds,⁷ riches chiefly consisted in estates in land, and it is to the

Return to Palestine.

¹ Horne, vol. iii. p. 76, *et seq.* Jahn's Biblical Antiquities, p. 38, *et seq.* Fleury, p. 42, *et seq.*, and p. 48. Pareau, p. 64, *et seq.*

² Josephus says that Hecateus lived in the time of Alexander the Great, and at the court of Ptolemy the First. Opera Josephi, Contra Apionem, liber primus, fol. 1048. The translation is by Gelenius, printed Colonie 1691. Fleury, p. 42. Josephus, *ut sup.* fol. 1049.

³ Jahn, History of the Hebrew Commonwealth, vol. i. p. 252. Fleury, p. 42, *et seq.*

⁴ Fleury, pp. 43-44.

⁵ Prideaux, vol. i. p. 130.

⁶ As Luke, xvi. 1, *et seq.* and 19, *et seq.* Luke, xii. 16, *et seq.* Matthew, xix. 20, *et seq.* Matthew, xxi. 33, *et seq.*

⁷ Jahn's Bib. Antiq. p. 54, *et seq.* Selden, De Successionibus, p. 1, *et seq.* and p. 26.

soil and its productions that the Scripture allusions are made,¹ as the contexts shew. These great proprietors would naturally adopt the system of cultivation by location to *coloni partiaris*. Evils, [21] indeed, seem to be inseparable from that system.² But these are counterbalanced by numerous and important advantages. Where the lands were thus let, the proprietor could enjoy comparative ease, and reside at home or abroad as he should be inclined; but where he was himself the cultivator, it was necessary, as the parable of the Labourers in the Vineyard shews, that he should reside on his estate, and attend to the minute details of management.

During the era of the Roman power in Judea, the recognition of the agricultural system existing in Italy, and therefore known to their governors, may have affected the rural economy of the Jews. Whether during the existence of the Jewish nation there was any direct legislation by the Romans affecting the Jewish polity is not distinctly to be traced. But it is certain that after the abolition of the commonwealth of Judea the Jews became the objects of special laws enacted by their conquerors.³ And it may have been, that at a time long previous to such laws, there were tendencies towards Roman forms, by which the usages of the Jews were partially modified.

The whole of the preceding discussion has reference exclusively to property in land. No information has been traced as to the location of houses, either in the cities or villages, or of mines, which abound in Palestine.⁴

CHAPTER III.

GREEK LEASE.

The Contract of Location, in the form of a written lease, was known in ancient Greece, but some of the details are involved in

¹ Fleury, p. 48.

² *Vide* as to ancient Rome, Pliny, Epist. ix. p. 37; and Chardin, *ut sup.* as to modern Persia.

³ Cod. lib. tit. ix. De Judæis et Coelicolis.

⁴ Horne's *Introd.* vol. iii. p. 83.

The author believes that much additional light could be thrown on the

subjects contained in the preceding discussion by one acquainted with the Rabbinical Books, for which, as formerly indicated, a knowledge of the original language would be indispensable. Much important information, he has been assured, is to be derived from the researches of German authors, who have accumulated a large and rich mass of

obscurity. A theory has been suggested, that foreign invaders of Greece found the aboriginal inhabitants acquainted with agriculture, but that having themselves neither inclination nor skill to practise cultivation, they converted the husbandmen into a species [22] of tenantry who paid rents, not by labour, but in produce.¹ Whatever was the original of the Grecian cultivators, it is certain that cultivation was pursued under a system, which in some states consisted of the occupation of land by slaves or serfs, who gave to the proprietors a portion of the produce, retaining for themselves a small residue as the wages of labour. In other states the contract of location was in operation conformably to its true principles and in its true form. In those states which ordinarily have been styled Dorian, the former system prevailed, mixed, however, with peculiarities by which it was greatly modified. In Laconia, the cultivators were termed Pericæci and Helots, and in Crete, Pericæci, Mnotæ, and Aphamiotæ.² In Thessaly, although not Dorian, there was a class called Penestæ, to whom similar characteristics applied. In Attica, the latter system was prevalent, and there the cultivators were styled Thetes and Palatæ.

Greek cultivators.

In Laconia and Crete there were marked distinctions between the classes of cultivators. It is difficult to determine the precise characteristics of the Pericæci, who formed the highest class. They were the subjugated aborigines, who served their Dorian conquerors, but in a mode which cannot be deemed to have been that of *coloni partiarum*. Although they appear to have been in a state of political inferiority to the Spartans, they were not oppressed or degraded, but were admitted to serve in the army. They were possessed, apparently in perpetuity, of numerous towns and of extensive territory. They cultivated the latter and gave to the Dorians a certain portion of the produce, by reason not of contract, but of a reserved right of possession. They were tributaries, bearing a fixed portion of the burdens of the state, not tenants paying a rent for lands. In Crete the Mnotæ were somewhat similar to the Pericæci, but inferior; and the Aphamiotæ were in a still more subordinate position, as they cultivated the estate of individual proprietors, but who appear also to have paid to the state a tax in kind.³ The Penestæ, in Thessaly, were in a condition inferior to that of the

Pericæci, Penestæ, &c.

erudition on the learning and history of the East. But unfortunately he is not conversant with German. His regret, however, is somewhat diminished by knowledge resulting from inquiries, that access to German works on Rabbinical learning is difficult.

¹ Jones, p. 76.

² Müller's History and Antiquities of the Doric Race, translated by Tufnell and Lewis, vol. ii. pp. 17, 24, 42, 52.

³ Rollin, vol. v. p. 82.

Periœci, but superior to that of the bondsmen of the Laconian states. They were not subject to the whole community, but belonged to particular houses and families, and were numerous in those of the high aristocracy. Their principal employment was agriculture, from the produce of which they paid a rent to the proprietors, but, as the residue belonging to themselves was considerable, they acquired property. They served in war, where they attended the persons of their lords.¹

Helots.

[23] In the Dorian states the Helots formed the great body of the cultivators of the lands of private proprietors. While the Helots have been ranked in the class of *coloni partiarum* or Metayers,² it is difficult to reconcile this theory with the rigid bondage by which they were characterised. If they are to be so classed, it must be in a sense greatly modified, and as very inferior in position to those who in other nations, ancient or modern, have been so denominated. But dealing with them as tenants of a particular class, their condition shall be shortly examined.

Plutarch, in his life of Lycurgus, writes "*Ilotes colebant iis agrum, vectigal statum pensitantes.*"³ The amount of the rent is given in another passage, "*Sors erat cujusque tanta, ut proventus redderet, viris septuagenos hordei medimnos, fœminis duodenos; et liquidorum fructuum secundum eandem rationem.*"⁴ Nicolas Cragius, in his treatise "*De Republica Lacedæmoniorum*," says, "*Opera autem Helotarum erant tum ut omnia servilia munera obirent tum potissimum ut agros colerent imposito tributo.*"⁵ An eminent historian of Greece represents the husbandry of Lacedæmon as exercised by the Helots alone, whom he regards as slaves in a miserable and degraded condition.⁶ The learned and accurate historian of the Dorians⁷ views the Helots in a more favourable aspect, but not as having a position resembling that of the *coloni partiarum*, the Metayers, or the Ryots of other lands. He describes them as serfs who could not be liberated nor be sold beyond the border of the state. On the lands of individual proprietors they had "certain fixed dwellings of their own, and particular services and payments were prescribed to them. They paid as rent a fixed

¹ Müller, vol. ii. p. 67. Mitford's History of Greece, vol. v. p. 99.

² Jones, p. 75, *et seq.*

³ Plutarchi Opera, by Bryanus, vol. i. p. 117. The Greek word *δραγμα*, which is here rendered "vectigal," is, in a passage in the same author to be immediately noticed, rendered "proventus," and it may also be translated *reditus* or *pensio*, words synonymous with "rent."

⁴ Plutarchi Opera, *ut sup.* p. 85.

⁵ Nicolai Cragii de Republica Lacedæmoniorum, lib. i. cap. xi., apud Gronovii Thesaurum Græcarum Antiquitatum, vol. v. fol. 2547.

⁶ Mitford's History of Greece, vol. i. p. 290, *et seq.*; and *vide* Rollin, vol. i. pp. cl.-cli.

⁷ Müller, vol. ii. pp. 31-35, *et seq.*

measure of corn; not, however, like the Periceci to the state, but to their masters. As this quantity had been definitely settled at a very early period, to raise the amount being forbidden under very heavy imprecations, the Helots were the persons who profited by a good and lost by a bad harvest, which must have been to them an encouragement for industry and good husbandry; a motive which would have been wanting had the profit and loss merely affected the landlords. And by this means, as is proved by the accounts respecting the Spartan agriculture, a careful management of the cultivation of the soil was kept up." Afterwards he states the annual rent paid for each lot of land, and then he inquires what would be the residue accruing to the Helot, which he does not precisely fix [24], but which must have been inconsiderable.¹ There is here observable a marked discrepancy between the condition of the *colonus partiaris* and that of the Helot. The former paid a rent measured by a portion of produce as a-half or a third, by which rule the amount of the rent varied with the amount of the produce. But the Helot paid a fixed rent, so that however small the amount of the whole produce was, the same amount of it was exigible from him in times of scarcity as in times of plenty. While this doubtless might operate as a stimulus to industry and good husbandry, it might *e converso* produce serious and continuous depression, by the exhausting effect which even a bad single harvest would have on the limited means of the cultivator. What were the remedies of these evils or the compensations has not been developed.

In so far as has been traced, there are no indications of the written lease among the inhabitants of the Dorian states, or of those the agricultural systems of which were formed on a similar model. A contract is easily supposable between the state and the Periceci, or even between the landowners and the Aphamiotæ; but its existence between his owner and the Helot would have been at variance with experience and probability. The fixed amount of annual rent, as the uniformity of its amount shews, was the result, not of individual arrangement, but of unalterable consuetude. The relative position of the parties excludes the supposition of a written lease.

Attica exhibited an aspect of a very different character. For ^{Attic} in it there were the contract of location, written leases, and a body ^{locum.} of inhabitants who can properly be styled tenants.

Lands, houses, mines, and other subjects, were let on lease.

¹ Müller, vol. ii. pp. 31-6, *et seq.*

the period. An important and curious document has been published by Maffei.¹ Its date is about the year 444, and it is entitled "Instructions given to the person sent into Sicily to reorganise the revenues of the House of Ravenna." In it are stated the sums due by the farmers. By it are proved, *first*, the existence of numerous farms, known by particular names, and each separately let; for the name of each lessee and the amount of rent payable by him is specifically inserted; *secondly*, the existence of fixed rents; *thirdly*, that these were payable in money or grain, or partly in each; *fourthly*, that certain services were rendered, the value of which was estimated; *fifthly*, that a regular record had been kept of all the details applicable to the estate, exhibiting an accurate rent-roll, and enabling the person sent to receive payment of the arrears to call the lessees to account with precision. Throughout, the document shews the existence of a course of management of a large and distant estate, similar to that which would be adopted in modern times.

CHAPTER V.

CONTINENTAL LEASE DURING THE MIDDLE AGES.

Sources of
information
as to
medieval
occupation
of land.

There is difficulty in ascertaining at what particular period, with relation to a great portion of the Continent of Europe, the operation of the law of Rome must be deemed to have fallen into decay, and that of the law of the Middle Ages be deemed to have begun to [31] be efficient. After the fifth century the notices of the mode of occupation of land are chiefly to be found in those treatises which embody the laws and deeds of the Barbarians. Notices indicating the character of the occupiers and the nature of the occupation of land are scattered throughout the compilation by Cancianus, usually called the *Leges Barbarorum*. Information of a more specific kind is afforded by the collections of *Diplomata* by Mabillon and Muratori, and by the *Formulae* or *Styles* collected by Marculfus, Bignonius, Goldastus, Sirmondus, and Lindenbrogius, which are embodied in the *Leges Barbarorum* and also in the *Capitularia Regum Francorum*.² From these sources may be gathered a knowledge, 1st, of the general mode of occupying land,

¹ *Istori Diplomatica*, pp. 130-7.

² *Leges Barbarorum*, tom. ii. and iii.

and the condition of the occupiers; 2*d*, of those matters as existing in different nations; and 3*d*, of the tenor and form of the deeds in which the contract of lease was embodied.

I. The general state of occupation which has been described as existing when the operation of the Roman Law is assumed to have fallen into decay, continued not only to exist in full force, but to increase and extend throughout the different continental nations. Land was, ordinarily, in the possession of the proprietor, and cultivated by his slaves or bondmen, bearing the same or similar names to those which have been already mentioned. In the few and incidental notices which occur relative to *coloni* in the *Leges Barbarorum*, there is evidence of their state of servitude, combined, in some instances, with a right to a certain share of the produce. For, if the fruits of the estate were carried off, the *colonus*, as well as the *dominus*, had a right of action, because each had an interest.¹ This shews that they were *coloni partiarii*, as the principle of partnership is involved in the rule.

General
mode of
occupation.

*Coloni
partiarii.*

In the collection of *Diplomata* made by Mabillon, commencing in the year 471, and here taken as ending about the year 800, there is a series of deeds which affords strong incidental, but intrinsic, evidence of the state of the rural population and of the mode of occupation of land. Throughout, there is no reference to any class which can be supposed to consist of cultivators altogether free; but there is repeated mention made of the conveyance of a "*villa*" or of a "*mansus*" (both denoting land under cultivation), and of the cultivators generally, under the terms of *mancipia*, *accolæ*, *adscripti glebæ*, *servi*, *liberti*, and occasionally, though rarely, *coloni* and *inquilini*, *rustici*, and *urbani*.² [32] Evidence to the same effect is derived from the ancient *formulæ* which have been preserved.

Bondmen.

But during the Middle Ages there were also free cultivators,

Free culti-
vators.

¹ *Leges Longobardicæ. Vids Leg. Barbar. vol. i. p. 140, note 4; 154, 157, note 8; 235, note 3. Edicta Regum Ostrothorum, cap. cxlvi. and cxlviii. Leg. Bar. vol. i. p. 13.*

² Mabillon de Re Diplomatica, p. 462. Charta Cornutiana, ann. 471. p. 484. Paction, measurement, and exchange of lands, *tem.* Dagover, ann. 632, p. 468. Charter of Erection of a Monastery, ann. 671, p. 476. Precept of Theodoric, granting a Villa to a Monastery, ann. 690, p. 478. Precept of Childebert III. of the same nature, ann. 694, p. 482. Placitum of Childebert regarding certain Villas, ann. 709,

p. 484. Precept of Chilperic III. confirming grant of immunities to a Monastery. Placitum, 489, of Pepin, Mayor of the Palace under Chilperic, ann. 748, p. 491. Placitum of Pepin, as King, regarding a Villa, ann. 752, p. 493. Precept of King Pepin in confirmation of a Villa in Parisiaco, ann. 754, p. 494. Charter of Sale by Count Chrodard, ann. 763. Charter of Donation of Grimulfrid, of various lands, ann. 770, p. 502. Precept of Charlemagne, ann. 790, p. 503. Charter of Ghiselac, sister of Charlemagne, ann. 798, p. 507. Renovation of the Testament Abbonis Patriaci, ann. 806.

whose number was small, and whose character and tenure have in some instances not been accurately ascertained.

Herimanni. First, the most important class were called *Arimanni* or *Herimanni*, regarding whose precise position in society a controversy appears to have existed.¹ Upon comparing the documents cited by Muratori and Ducange with the notices contained in the *Leges Barbarorum*, the result appears to be, that although there were many *Arimanni* who were rich and noble, there were others poor, but free, who cultivated the lands of others, as modern farmers now do; and such is the opinion of Muratori.²

Farmers or lessees of Crown lands. Secondly, The domains of the Crown seem, in some countries, to have been let to farmers for a limited period, and either for a share of the produce or a rent which was not to be diminished. This is established by a Constitution of the Emperor Frederic, relative to the Crown lands of Naples and Sicily, addressed to his procurators, and containing the form in which those lands were to be let. From the tenor of the Constitution the lessees may be deemed to have been freemen, and the conditions to have been engrossed in a written instrument.³ Throughout the *Leges Barbarorum* a distinction is drawn between the rural population of the lands of ordinary proprietors, and those of the Crown lands, as the latter are generally classed or assimilated with those of the lands of the Church; and as it is known that the cultivators of the latter were in many instances free, and held under written leases, the same rule may be presumed to extend to the former, more especially when confirmed by the Constitution, which has now been noticed. In one instance it is expressly said, that all the freemen attached to the Church, whom they call *Coloni*, shall so render to the Church as do the *Coloni Regis*.⁴

Of Church lands. Thirdly, The lessees of Church lands were very generally free cultivators, holding under regular leases, which contained a return in a fixed rent and specific services and strict rules as to cultivation. This is established by the texts already noted, by the rules laid down *de colonis ecclesiarum*,⁵ and still more fully by the deeds preserved by Muratori, Ducange, Marculfus, and other compilers of *Formulae*.
Examples in particular nations. [33] II. This account of the general state of the occupation of land will be confirmed by a few examples selected from the condition of individual nations.

France. The ancient deeds and customs of France have been better preserved than those of almost any other nation. The valuable and

¹ Vide Muratori *Antiquitates Italicae*, tom. i. pp. 700 and 722-43. Ducange, *ecce Herimanni*.

² Muratori, tom. i. p. 722.

³ *Constitutiones Regni Siculi*, ap. Leg.

Bar. i. pp. 331-2.

⁴ *Lex Allemannorum*, ap. Leg. Bar. ii. p. 328.

⁵ *Lex Bajuvariorum*, ap. Leg. Bar. ii. p. 362.

extensive collection made by Mabillon consists almost entirely of the Diplomata of that country. By them it is proved that the cultivators consisted principally of slaves and bondmen, with a small portion of free farmers interspersed.¹ The number of free cultivators had to all appearance gradually increased in France, as before the termination of the long period, generally called the Middle Ages, there are contained in the *Coutumiers* detailed provisions relative to lands let in farm. In the treatise on the *Coutumes de Beauvoisis*, written by Phillipe de Beaumanoir, who flourished in the period between 1273 and 1296, there is a chapter devoted to that purpose. From that treatise it appears, 1st, That lands, vineyards, houses, and other heritages were let, and that the term "ferme" was used; 2^d, That there was a limited duration; 3^d, A fixed rent; 4th, The exaction of surety; 5th, An obligation to cultivate; and 6th, An obligation to leave the subjects as good as when entered to, and to repair all damage.²

The condition of the rural population and of the occupation of the lands in Germany, is given in the learned work of Potgiesserius, derived from sources not easily accessible in this country. From his treatise it appears that among the Germans of the Middle Ages it was common to remove the free cultivators from the lands, and to supply their place with slaves, or to reduce them to a state of comparative servitude, by obliging them to cultivate the lands and to make such a return either in produce or in money, as their lords should direct. In time, many of those cultivators became free, and consequently there existed *liberi coloni*, to whom the proprietors let the lands at a certain rent, and for a definite time. Alternations however occurred, by which many of those free cultivators were again reduced to servitude by becoming astricted to the lands.³ Potgiesserius remarks that, in the older deeds, *servi* and *coloni* are often confounded, and that it was comparatively seldom that the latter were altogether free.⁴

In Italy, although the lands may have been cultivated at an early period, partly by the proprietors themselves, and partly by free farmers, yet, at a later period, they were cultivated by the former almost exclusively. In a modern treatise in which the subject of "Metayer Rents" is ably discussed, it is said that from many districts of Italy it is probable that the *coloni medietarii* (*partiarri*) [34] never disappeared.⁵ If this surmise be correct, the number of

¹ Vide references made to Mabillon, *ut sup.*

² *Coutumes de Beauvoisis*, c. xxxviii.

³ Potgiesserius, lib. i. cap. iv. sec. 34, *et seq.*

⁴ Potg. *ut sup.* pp. 207-8.

⁵ Jones, p. 97.

these *coloni* must have been so small that they were scarcely noticeable. This is an unavoidable inference from the work of Crescenzi upon the agriculture of Italy, written towards the end of the thirteenth century,¹ or the earlier years of the fourteenth. In it no mention is made of these *coloni*, or of tenants of any description. In his chapter on the duties of a *villano* (steward)² and in that on the duties "*del padre della famiglia*,"³ Crescenzi assumes that the lands are cultivated by the proprietor. Nor throughout his work does he either mention the fact, or suggest the probability, of lands being cultivated otherwise. In the Epistles of Morgagnus, which, from intrinsic evidence, appear to have been written towards the end of the sixteenth century, no notice has been traced of *coloni medietarii*. This may, indeed, be attributable to those Epistles having reference almost exclusively, as they indicate, to the treatises by Columella, Palladius, and other ancient writers on agriculture.⁴ But the omission may be ranked as negative evidence; for, as the *colonus partiarius* was known in the times of those ancient agricultural authors, it may be deemed that, if the *colonus medietarius* had been common in Italy when Morgagnus wrote, his existence would have been noticed.

Written
leases.

III. Where written leases existed, a perfect knowledge of their form and tenor can be ascertained from deeds which have been preserved. Almost all of those deeds relate to leases of Church lands. This naturally arises from the facts that such leases were most common, and that the churchmen, who were the successors of the Roman notaries, and the sole conveyancers of the period, had the means of preparing such documents and of preserving them in their protocols and chartularies. The leases which are extant consist either of deeds in the form of charters, embodying the mutual stipulations, or of grants which are called *precariae*, and which are by much the more common. In neither is the form that of a bilateral contract, but it is that of a grant by the proprietor to the lessee, for a definite period, and upon certain conditions. At what time the form of contract, as known to the Roman law, was superseded by the deed used in the Middle Ages, has not been ascertained. But the prevalence of feudal ideas and feudal forms necessarily led to the adoption, in all matters relative to land, of the form of the charter or grant, as emanating from

¹ Trattato della Agricoltura de Piero De Crescenzi.

² Crescenzi, vol. i. p. 49, cap. 12. Dell' ufficio del Villano.

³ Crescenzi, lib. i. cap. xiii. p. 52.

⁴ Scriptores rei rustice, vol. ii. p. 1195, et seq.

the will of the lord, and embodying a tenure under him for a specified return.

The earliest deed, which, although imperfect, may be denomi- An example
nated a lease, has [35] been published by Muratori, is dated in 777,
and is entitled *Locatio prædii facta a Peredio Episcopo Sensensi*.
After the introduction ordinarily used in charters, there is a declara-
tion by the lessees named and described, that, because the granter
had placed them to reside "*ad residendum*," where formerly "*Uroulus*
Massarius habitabat," they and their heirs were bound, *first*, to
labour, manage, and improve the lands; and, *secondly*, to pay a
rent in produce or money to the granter and his successors. To
this deed the lessees subscribe their marks before witnesses.¹

A *placitum* or decree, dated in 853, to remove lessees on account A medieval
decree of
removing.
of their having deteriorated the lands let to them, has also been
published by Muratori. In it a short enumeration is given of the
conditions of the lease, the violation of one of which formed the
cause of the removal.² The "*residentes*" described in the pre-
ceding document, and frequently mentioned in ancient charters,
were free cultivators.

But the most important document, because the most ancient Lease of
869.
example of a complete lease, is one of which likewise Muratori has
published a copy. It is dated in the year 869, and is entitled
"*Charta Walperti Episcopi Mutinensis*," by which he has given
("*tribuit*") to John, a freeman, a farm to be cultivated. In this
deed the transition from the form of contract to that of grant is
singularly indicated, for it partakes of the nature of both. It is
called a charter, by which the granter has given so much land to
be cultivated, and it commences in the form usual in charters.
But it bears to have proceeded upon a convention or agreement
between the parties, involving specific mutual stipulations. Mura-
tori considers it as affording a remarkable example both of the forms
and of the conditions under which lands were formerly let to be
cultivated by the *Arimanni* or *liberi coloni*. The more important
of these conditions are, *first*, That the lands, according to a very
specific description, are given or let for the purposes of residence
or labour; *secondly*, There is a destination apparently to heirs;
thirdly, There are conferred upon the lessee certain powers, and
there are imposed upon him certain obligations relative to the
mode of cultivation, planting, and erecting and preserving build-
ings and fences; *fourthly*, There is a definite duration; *fifthly*,
There is a fixed rent, exigible partly in grain of two different
kinds, partly in sheep and fowls, and partly in services; and,

¹ Muratori, Antiq. Ital. tom. ii. p. 723. ² Muratori, Antiq. Ital. tom. iii. p. 168.

bestow any great pains or industry.¹ These contracts are supposed to have become more numerous, when, by a change of manners and the increased importance of parliament and the court, the lords lived less on their domains, and needed a more permanent income in money.²

Writers. These causes are accordant with probability; but whatever was the cause, the fact that there were numerous contracts of lease throughout the whole of the Norman and Anglo-Norman periods is unquestionable. The earliest work extant upon the law of England

Glanville. is that of Glanville, written in the time of Henry II. In it a chapter is devoted to the development of the doctrine of location for a certain period and a certain return, and the location of immoveable subjects is involved, as the lessor's powers of expelling the lessee, upon account of non-payment of rent, are examined.³

Bracton. In the treatise of Bracton, written towards the end of the reign of Henry III., the subject is examined in detail. *First*, There is a dissertation upon the ordinary doctrine of location, apparently that of the Roman law, in which separate mention is made of the location of [42] real property. *Secondly*, In treating of novel disseisin, there is a chapter in which is discussed the right of the *firmarius* to a breve to recover possession of his *firma*, if he shall be ejected within the term. In it a distinction is expressly drawn between the rights of the proprietor and the lessee, for it is said that in one and the same tenement one may have the free tenement itself, and another right to the produce, and to use and habitation. This latter right is created *conventionem*, the possessor is called *firmarius*, and the possession *firma*; and, if ejected, he is entitled to a breve to recover his seisin or possession *contra quoscunque dejectores*.⁴ *Thirdly*, The *firmarius* is entitled to the breve *de ingressu*, through which he may obtain entry or possession.⁵ And, *fourthly*, In treating of the *dominium*, the existence of the right of property in one, and of the right to the produce in another, through contract, is repeated.⁶ The doctrine of Bracton is confirmed by the anonymous treatise entitled "Fleta," which was written in the reign of Edward I.⁷ The dissertations in it upon location,⁸ and the rights of the *firmarius*,⁹ are so similar to those of Bracton, as to create a belief that they were compiled chiefly from him.

Britton. Britton, who, during the same reign, wrote a treatise in French, uses the words "lessor" and "to lease;" and, under the title

¹ Bacon's Abridg. voce Lease.

² Barringt. p. 310.

³ Glanv. c. 8.

⁴ Bract. lib. iv. tract. i. c. 36, fol. 220.

⁵ Bract. lib. iv. tract. vii. c. 8, fol. 326

⁶ Bract. lib. ix. tract. ii. c. 9, fol. 263.

⁷ Selden's Fleta, pp. 454, 547. Senger's Life of Selden, p. lxii.

⁸ Fleta, lib. ii. c. 59.

⁹ Fleta, lib. iv. c. 31.

CHAPTER VI.

ANCIENT ENGLISH LEASE.

The state of the agricultural population and of the possession of landed property was, in England, very similar to that which has [37] been detailed as existing throughout the Continent. The subject shall be examined under the same general heads, namely, I. The condition of the occupiers of the lands; and, II. The nature and effects of the tenures of temporary possession.

I. A system has been suggested according to which the condition of the agricultural population, as well as the leasehold tenures both of England and Scotland, have been derived exclusively from ancient Germany.¹ Although, perhaps, some of the details may be attributable to this source, it is apparently an error to consider the whole system as derived from it. The state of the rural population and of the contracts of location in ancient Rome, has been shewn to approach so closely to those existing on the Continent in the Middle Ages, and the latter to bear so marked a resemblance to the lease of modern times, that the Roman law may justly be deemed the source. But the same general causes produced a similarity between the rural population and agricultural customs of ancient Rome and ancient Germany, modified by the very different degrees of civilisation to which the inhabitants of the respective countries had attained. In ancient Rome, the *villa* or lands in the immediate occupation of the proprietor were cultivated by his slaves, while his more distant estates were let upon lease. In ancient Germany there existed a distribution, the same in principle, but differing in extent. The proprietor retained, to be cultivated by his servants for domestic uses, the ground immediately surrounding his residence; while the land which was situated at a greater distance was cultivated, originally by slaves, but afterwards by husbandmen who made a return in produce.²

Leasehold tenures of Britain derived not from Germany, but from Rome.

When the Saxons settled in England, they either introduced the customs of their ancestors, or, more probably, combined them with those rules which had been established under the Roman colonists. The fact of the existence of manners and of a distribution of possessions, analogous to what has been described, is certain, although its precise source cannot be traced. Among the

Saxon customs.

¹ Ross's Lect. (title Task.)

View of Society in Europe, p. 217. 2

² Tacitus, *De Mor. Ger.*; Stewart's

Ross's Lect. 468, *et seq.*

Saxons the land was distinguished into "Inland and Utland," the former corresponding to the *villa* of the Romans, and the latter to the lands cultivated by tenants. Spelman, accordingly, under the word *villa* and *mansum* or *manor*, expressly compares the Saxon with the Roman country establishments.¹ But perhaps the distribution more resembled that which existed among the Germans, according to which a part was occupied by the proprietor, and a part was cultivated by his retainers.

No certain means of information appear to exist, through which [38] can be traced the proportions between the free agricultural population and that which was under thralldom. In all probability the number of the latter greatly predominated; but that the former existed to a considerable extent is unquestionable. The *adscripti glebe nativi* were known to the Saxons under the name of bondmen, or thralls or theowmen, and the tenure of *villeynage*, which was not entirely Saxon, Norman, or feudal, but of a mixed nature, is supposed to have originally grown out of the Saxon bondage.² From the laws of Ina, cap. vii., it is obvious that there were slaves, who, with their wives and children, were the property of their master.³ In the work of Bracton *De Legibus et Consuetudinibus Anglie*, written in the reign of Henry III. and of high authority in the law of England,⁴ reference is made to the existence of *servi* or *nativi* before the Conquest, to whom are ascribed a tenure and services similar to villeynage, and, in more modern books there is mentioned the existence of a class among the Saxons who were employed in the most servile works, and belonged to the lord of the soil.⁵

Free cultivators.

The evidence of the existence of free cultivators is equally conclusive, being founded, not merely upon a series of authorities, but on the more firm basis of authentic contemporary documents.

Spelman, in analyzing the terms "Inland and Utland," describes the latter, in contradistinction to the former, as that portion which was let *colonis tenentibus*, and which in modern language was called "*tenementalis*." In proof of this distinction he refers to the testament of Britheric of Kent, by which, according to the transla-

¹ Spel. voce Villa.

² Wright on Tenures, 215-16.

³ Leg. Bar. iv. 236; Wilkin's Collection of Saxon Laws. The author is aware that Wilkin's Collection has been said by a legal antiquary to be a forgery; but as the laws which form parts of the Collection have been referred to by Spelman and other antiquaries, as well as by numerous modern writers of English history, he considers himself

entitled to follow the more ordinary practice, and deem them to be genuine.

⁴ Selden ad. Fletam, p. 464; Bracton, lib. i. cap. ii. fol. 78.

⁵ Spelm. Gloss. ad verb. Servus. Bacon's History of the English Government, p. 56. Brady's General Preface, p. 26. Temple's Introd. p. 59. Wright on Tenures, *ut sup.* Henry's Hist. of Brit. vol. ii. p. 228.

tion of Lambard, he bequeathed to one person the inland or demesnes, and to another the utland or tenancy. A corresponding description is given under the term "utland," from which it appears that it was in some instances cultivated by bondmen, and in others by freemen. The well-known denomination of the cultivators among the Saxons was that of Ceorls or Ceorlmen, who, though of Ceorls. a low condition, were free,¹ although the term seems occasionally to have been applied to rustics of all classes, and consequently to theowmen.² In Latin (but when the word was introduced is uncertain) those cultivators were called "*firmary*," from the Saxon word *feorme*, which seems originally to have signified produce to be supplied for [39] the consumption of the proprietor, and which, by an easy transition, was afterwards made to apply to the land from which the produce was supplied.³ Ingulphus, in his History of the Saxon Abbey of Croyland, speaks explicitly of the *firmary*;⁴ and Bracton, in detailing the different conditions of persons, asserts the existence, at the Conquest, of *liberi homines* among the rural population,⁵ who held their tenements by free services and free customs, and who, it is obvious from the descriptions afterwards given by himself,⁶ by Fleta,⁷ and by Britton,⁸ possessed by the same tenure as did the *firmary* after the Conquest.

These notices are confirmed by the laws as well as by the deeds of the period. From the 70th chapter of the Laws of Ina⁹ it arises that leases of lands were recognised, for the regulation embodies a restriction of the rent or produce to be levied from each ten hides of land; but the existence of such a regulation proves that there were contracts of location. The view is adopted by Spelman, who deems the regulation applicable "*in elocandis prædiis*," and compares its restrictive effect with the unfettered power of fixing rents which prevails in modern times. But the most satisfactory evidence is derived from the existence of those leases styled demises Saxon was recognising leases. which are recorded by Madox in his *Formulare Anglicanum*, of Forms of leases. which the tenor shall be more fully examined hereafter. In them a specific rent is fixed, but the tenants appear to have been at will. The date of the earliest of those demises which Madox has noticed must be between the years 1020 and 1038. The deed is justly styled by him *præstaria traditio*.¹⁰ Although the date of this *præstaria* is not much anterior to the Conquest, it proves both the

¹ Duncage, *vocæ* Ceorls.

² Henry's Brit. vol. ii. 231.

³ Barrington on the Statutes, p. 302.

⁴ Spelm. *voc. Firma, Firmaryus*. Duncage, *ita. voc.*

⁵ Brac. lib. i. cap. 11, fol. 7, 8.

⁶ Bract. lib. iv. tract. i. cap. 36, fol. 220; tract. vii. cap. 8, fol. 326.

⁷ Lib. iv. cap. 31.

⁸ Brit. cap. 64, fol. 160.

⁹ Leg. Bar. iv. 242.

¹⁰ Madox, *Formulæ Anglicanæ Introductio*. Disserta. art. 20.

pretending a superior right, upon which he made default. Consequently, the right of the proprietor being thus apparently set aside, the leases depending upon it likewise fell; nor was the lessee allowed to defend himself in the action, although he knew it to be collusive. But, by the statute of 21st Henry VIII. c. 15, if a man have lands for years, and afterwards suffer a feigned recovery, if he who recovers enters, the termor shall have an *ejectione firme* against him, because that statute gives him power to retain, hold, and enjoy his term. By the operation of this statute, leases acquired in England so high a degree of security that they have been granted for very long terms, and have generally been resorted to for the purposes of family settlements and mortgages.¹

CHAPTER VII.

ANCIENT SCOTTISH LEASE.

Origia.

Theory of
Lord
Kames.

Authors have advanced different theories of the origin of the contract as now known in Scotland. A writer of the last century, possessed of much acuteness and ingenuity, has proposed a system, plausible, but not supported by fact. The land he represents as having been originally occupied and cultivated by bondmen, whose want of industry made it eligible to have recourse to the superintendence of a freeman, to whom at first were given a few acres, and who subsequently received a proportion of the produce in the place [46] of wages. Afterwards the proprietor accepted of a yearly quantity, certain, and allowed the servant to retain the residue. In a more advanced stage the servant was enabled to secure the fruits of his industry by a lease for years, which converted him into the modern tenant or farmer.² When viewed as a theory, each step in this progress is compatible with probability, but although it be true that the larger portion of the lands was cultivated by bondmen, there are no historical data for the hypothesis, according to which the tenant or occupier by lease is supposed to have arisen. From the earliest period there were intermingled with the bondmen free farmers, who held under written contracts for definite terms, and for fixed rents. The obvious benefits result-

¹ 2 Blackst. Com. 356, *et seq.*

² Kames' Historical Law Tracts, pp. 162-4.

ing to the proprietor from their superior skill and industry gradually increased their numbers until they superseded every other description of cultivators.

Aware of these facts, another writer has adopted another theory, ^{Theory of Mr. Ross.} sound in its immediate application to Scotland, but erroneous as to the source from which the formal contract of lease was derived. While he acknowledges that as among the Romans there was a contract bearing a close resemblance to the modern lease, he deems that the origin and principle of that deed must be sought for in a different quarter. Ancient Germany is the quarter to which he resorts, and he endeavours to trace the progress of the contract from the mode of occupying land and distributing its produce among the aboriginal Germans, through the Saxon and Anglo-Norman periods down to the date of the Scottish statute by which the leasehold tenure assumed a permanent form.¹ In tracing the progress of the lease from the Saxon period, the views of this author are just, although not supported by a sufficient number of facts, but he has erred in deeming that the Roman contract was not the origin of the Scottish lease. Not only was the contract the same in principle and conception, but the style and clauses are alike, conformably to the views already developed.² The form and tenor of the contract were transmitted from the jurists of the Upper Empire through those of the Lower Empire to the churchmen who, during the Middle Ages, were the only conveyancers. By them the form of the contract was preserved, nearly in a state of uniformity throughout Europe. The deed, as practically known upon the Continent, is substantially the same as that adopted in England and Scotland, in which countries precisely the same style existed for many centuries. These facts are vouched by the unquestionable authority of contemporaneous documents, and the remainder is preserved in records of undoubted authenticity.³ This system has been [47] suggested, but not fully developed, in a recent Treatise upon the Law of Lease.⁴ A more full development of it has been in part attempted in the preceding chapters of this introduction, and shall be proceeded with from the earliest notices of it which exist in the laws and records of Scotland, down to the period when the modern lease was first embodied as part of a regular system of juridical styles.⁵

Throughout the earlier periods there is so strong a resemblance ^{Early history of Scottish cultivators.}

¹ Ross' Lectures, voce Tack, vol. ii. p. 456, *et seq.*

² *Vide* chapters iv. v. and vi. of Introduction.

³ The author refers to the Chartu-

laries, to be noticed in a subsequent note.

⁴ Bell on Leases, in Introduction.

⁵ Dallas.

Chartul-
aries.

between the state of society and of the law in England and in Scotland, as to create a conviction that they are derived from a common origin. But, unfortunately, there is much obscurity in the history of the Scottish cultivators of the soil. No connected or detailed account is given by Craig, Stair, or any other writer of authority, and even few notices are contained in their works. Recourse, therefore, must be had to the collection of laws published by Sir John Skene, containing the *Regiam Majestatem*, *Leges Burgorum*, and the Statutes prior to the reign of James I.¹ Partial but important information is also to be gathered from the Statute Book. But the most valuable source of knowledge is the great collection of deeds contained in the Chartularies of the different abbacies and other ecclesiastical establishments.² Those deeds extend in a regular series through several centuries, and apply to every part of Scotland. As contemporaneous documents, they afford the most authentic and conclusive evidence of the condition of the rural population. From them, combined with a very few notices in the Books, is to be derived the only information relative to the tenor and form of the ancient Scottish lease.³

[48] I. According to the course adopted with relation to other countries, the ancient condition of the rural population of Scotland shall be first examined. From that examination it will appear that the cultivators were the same mixed class which existed

¹ It is almost unnecessary for the author to mention that he is aware of the doubts which exist relative to the genuineness of many parts of this collection; but he has thought himself justifiable in using it, because it has been referred to by the great majority of writers on the law of Scotland, and because, when considered in a historical view, its details are confirmed by unquestionable evidence establishing the existence of the state of society for which its ordinances provide.

² The collection to which reference is made is that of the Chartularies of different ecclesiastical establishments, preserved in the Advocates' Library, Edinburgh.

³ This important and extensive collection of ancient Scottish deeds has not hitherto been sufficiently examined by legal antiquaries. In all departments it contains a valuable and almost inexhaustible mine of juridical learning. The author examined the copies of the Chartularies in the Advocates' Library, commonly called the Macfarlane MSS., which he has been

assured, upon good authority, are accurate. His references are made to those manuscripts, and are the result of personal inspection. The Chartularies of Paisley, Melrose, Moray, Holyrood, Balmerino and Lindores, Sciennes, Dunfermline, and Glasgow, had been printed when the second edition of this Treatise was published. Since the publication of that edition the Chartularies of Kelso, Dryburgh, St Andrews, Brechin, Arbroath, Newbattle, Inchaffray, and Scone have also been printed. All of them have able introductions by the Maitland, Bannatyne, and Abbotsford Clubs. Much important historical matter is embodied in all of these printed Chartularies, but those of Arbroath, Dunfermline, and Kelso are of most value to the jurist. The Author has selected from some of them a few additional details relative to the ancient Scottish lease. [For later information as to Chartularies, and as to the early Scotch occupation of the land, see Innes' *Lectures on Scotch Legal Antiquities* (Edin. 1872), ch. vi.]

elsewhere, composed partly of slaves or villeyns and partly of *liberi firmarii*.

Craig, in treating of the tenure of villeynage, hints that slavery ^{Villeyms.} or thralldom had always been little known in Scotland; and affirms that, in his time, it had become extinct, while there were some remnants of it in England.¹ The latter position may be assumed to be correct, because it was within the actual knowledge of the author; but unhappily the national vaunt which the former position implies is devoid of foundation.

In the *Regiam Majestatem* and the other ancient laws, there is a series of provisions proving the existence of pure villeynage. In the *Quoniam Attachamenta*² there is a chapter intituled *Breve de Nativis*, in which occur the terms *nativi*, *fugitivi homines*, and *bondagium*. A detail is given of the modes in which villeynage might be created, by birth *infra terram servilem*, by accepting of *terre serviles* and rendering *servile servitium*, and by a freeman giving himself up voluntary into bondage. In the *Regiam Majestatem* there are laws imposing restrictions upon bondmen, and laws conferring upon them certain privileges, and also the means of acquiring freedom. A bondman (*servus*) was prohibited from being an arbiter, even if the parties should consent.³ In the same code there are chapters intituled, "De servis nativis ad libertatem proclamantibus," and "Quibus modis de servitute ad libertatem pervenitur."⁴ These chapters prove the existence of villeyns *adscripti glebæ*, and that the property of the villeyn belonged to the lord. They lay down the rules for trying *quæstio status*, whether a man claiming to be free was or was not entitled to his freedom. It is provided by them that villeyns, except those of the Crown, continuing unclaimed during seven years upon the land of another, or for one year within a royal burgh, should become free. The regulation relative to the acquisition of freedom by residence in royal burghs is also laid down in the *Leges Burgorum*.⁵ In other laws (to be hereafter noticed) the existence of bondmen is proved by the distinction drawn between them and freemen.

These notices are confirmed by the known history of the period. In the work of the learned and accurate historian who has minutely scrutinised the earlier history of Scotland, it is said that, in 1258, slaves and their children were conveyed from one master to another in the same manner that sheep and horses are now; and that not [49] together with land, but even without land.⁶ This account is

¹ 1 Craig, xi. 32.

² Quon. Attach. cap. 56.

³ Reg. Maj. lib. ii. cap. iv. sect. 1.

⁴ Lib. ii. cap. xi. xii.

⁵ Leg. Burg. c. 17.

⁶ Hailes' Annals of Scotland, vol. i. p. 372.

founded upon deeds contained in a Chartulary, by which grants are made of the slaves of the granters, with their whole families, fortified by perpetual warrandice.¹ A series of deeds in other Chartularies confirms this state of bondmen, both before and after the period now mentioned. The Chartulary of Coldingham contains many very ancient deeds. Among them are, *first*, a charter of Earl David, granting lands and *drengs*. Antiquarians have not determined the precise degree of servitude to which these bondmen were subject; and they have been deemed not to have been of the lowest class.² But this conveyance of them along with the land proves that they were villeyns *adscripti glebae*. *Second*, There is a charter of King Malcolm ordering "*fugitivos*" to be restored. *Third*, There are charters by the same king, ordering that the "*proprius homines*," of the Abbey be seized wherever they shall be found, that they shall remain upon the lands, and that no one shall attempt to prevent their owners from recovering them. *Fourth*, There are two charters of King William, addressed to the justices, sheriffs, and vassals, ordering "*fugitivos et nativos homines*" of the Abbey, "*cum omnibus rebus et catallis eorum*," to be restored wherever they shall be found.³ In a charter of confirmation granted by David I., whose reign began in 1124, a grant is made of all the *servi* and *lomerlach*, that is, *fugitivi servi*, with their families and effects.⁴ In the Chartulary of Kelso, there is a grant by Earl Waldeve of two serfs named, with all their children *et omnes sequaces*.⁵ Throughout the Chartularies mention is made of *nativi*, *villani*, and more frequently *homines sui*. They are also called carls, bonds, and serfs. By each of these names, as well as that of villeyn they are recognised.⁶ Although the term *homines* is ambiguous, being occasionally used for feudal vassals, yet, in the mode in which it is employed, and from the connection in which it stands, it evidently signifies those who were in a servile condition.⁷

*Humili et
Agrestes.*

No doubt can exist of the servile condition of those classes of the rural population; but in the Regiam Majestatem and in the other ancient laws, mention is made of *rustici* and *agrestes*, whose precise state it is not easy to ascertain. A doubt may exist whether freemen may not have been included under these general appellations, which derive their sole significance from the bearers of them

¹ Chart. of Inchaffery (Insule Miscarum), pp. 59-60. A printed copy of this Chartulary has been deposited in the Advocates' Library since the second edition of this Treatise was published.

² Ducange and Spelm. *voc* Drench or Drengus.

³ Chart. Coldingh. pp. 4, 14, 25, 26.

⁴ This charter is published in the

Appendix to Dalrymple's Collection, and is cited in 2 Ross' Lect. 484.

⁵ Chart. Kelso, No. 123, 127.

⁶ Preface to Chartulary of Kelso, p. 35, *et seq.*

⁷ Chart. Kelso, No. 16, 116, 405. Chart. Melrose, Nos. 27, 30, 67. Chart. Arbroath, vol. ii. Nos. 47, 52, *et al.*

being [50] the inhabitants of the country, as distinguished from the inhabitants of towns. But much the stronger probability is, that they were in a state of servitude, either *villani* or otherwise *obnoxii*, as it is termed by the feudalists. 1st, In the *Regiam Majestatem*, a "*rusticus*" is to be admitted as an accuser or witness in cases of high treason. From this rule it would appear that he was held to be a person in a servile condition, whose evidence would have been excluded in an ordinary case, but whom the high nature of this crime rendered it necessary to admit.¹ 2d, In the next chapter of the same treatise, rules are laid down relative to the right of declining the duel upon account of age or mayhem. If there be a declinature, the accused must purge himself by the judgment of God, namely, by red-hot iron if he be *liber homo*, or by warm water if he be a *rusticus*, according to the difference of the condition of the men.² The rustic is here expressly held not to be free, as being contradistinguished by name, condition, and legal right, from the freeman. 3d, In the *Leges Burgorum*,³ there is a chapter *De rustico burgense*. In it there is a provision that a "*rusticus*" living without burgh shall not elsewhere be accounted a burgess, and that questions between such a rustic and a burgess shall be tried by the burgh law; the rustic being entitled to the right of duel with the burgess. Thus, while the acquisition of the rights of a burgess raised the condition of a rustic, it did not remove the disqualification of his servile condition, or confer upon him the thorough rights of a freeman. He was entitled to hold real property, with relation to which he had a right to be upon a footing with the burgess; but, by reason of not residing within the burgh, he did not acquire those extensive immunities to which burgesses had right, which distinguished them from the servile cultivators, and rendered them freemen throughout the realm. In the statute of William, *De molendinis*,⁴ ordaining the different quantities of multure to be paid by persons of different stations, a specified quantity is imposed upon the "*rusticus*" and the "*firmarius*" in terms from which it is to be inferred that those names must have been appropriated to different classes. But, in the noted statute of Alexander II., *De Agricultura*,⁵ the term *rustici* is apparently used indiscriminately for all classes of cultivators. This general application may, however, be accounted for by the fact, that the class holding by servile tenure was so much more numerous than the free cultivators that mention of them was deemed sufficient for effectuating the purposes contemplated by the statute.

¹ Reg. Majest. lib. iv. cap. ii.² Cap. iii.³ Leg. Burg. cap. xiii.⁴ Stat. Will. cap. ix.⁵ Stat. Alex. II. cap. i.

In the statute *De Agricultura*¹ there occurs the term *agrestes*, which is translated "fieldmen" by Balfour.² If possible, the condition [51] of the *agrestes* is less known than even that of the *rustici*. The statute proves that they were possessed of property, and that they cultivated the lands under the *comites* and *barones*. In one of the sections ordaining a forfeiture, they are represented as holding under the *comites*, and in the next section they are contradistinguished from *servi*. From these notices it is to be conjectured that, although not altogether free, they were of the highest class of villeyns.

These different orders of villeyns cultivated the domain, which was called the *territorium dominium* or *feodum*, and corresponded with the *villa* of Rome and the inland of England.³

Independently of those servile cultivators there were others of free condition, who were, as on the Continent and in England, known by the name of *firmarii*. In the Quoniam Attachiamenta there is mention made of *terra servilis*, which proves the existence of a distinction between the lands cultivated by villeyns and those cultivated by others.⁴ In the same code⁵ it is laid down that no *firmarius* can injure the right of the lord of his free tenement by doing, within his term, to another any *servitium* not due for that tenement; nor can any act done by him after the expiration of his term be to the prejudice of his lord. Besides the use of the term *firmarius* itself, this ordinance establishes the existence of lessees holding for a term or definite period, and having in the lands a right different from the right of the lord of the free tenement. It corresponds very nearly with some of the positions laid down in the English Books, and particularly by Bracton, when treating of the *liberi firmarii*. By the statute of William already noticed, provision is made for the quantity of multure to be paid by the *firmarius*; and in one section a regulation is laid down relative to persons who take land *ad firmam* in any barony for a particular term, which can be applicable only to lessees of free condition. A difficulty apparently arises from one provision of the statute, by which a *liber homo* is ordained to pay a certain quantity, and a *firmarius* a certain smaller quantity; but no argument against the free condition of the *firmarius* can thence be deduced, because *liber homo* evidently applies to the feudatory, the multure exigible from him being regulated in a greater or less quantity "*secundum quod feofatus est*." In chapter thirty-third of the statute of William, re-

¹ Sect. 2.

² Balfour, p. 536.

³ Chart. Kelsa, Nos. 123, 298. Chart. Dryburgh, Nos. 89, 161.

⁴ Quon. Attach, cap. 56.

⁵ Quon. Attach. c. 44.

straining the barons and free tenants of the realm from injuring their domains by living as husbandmen or shepherds and not as proprietors, it is ordained that they shall live conformably to the latter character upon their revenues and the rents arising from their farms, distinguished by the term *firmis suis*.

[52] The statute of Alexander II. relative to the extirpation of *maneleta* or gild,¹ draws a marked distinction between the *firmarius* and *nativus*, subjecting the former, if he shall disobey, to the punishment of one who raises sedition in the army, and the latter to a small forfeiture. The *firmarius*, therefore, must have been of a higher class and coming nearly within the line of feudalism, as the punishment to be inflicted on him was strictly accordant with feudal notions. This receives confirmation from Balfour,² who translates the word *firmarius* by tenant or mailer. The statute of Robert III. c. 37, *De venditione firmæ terræ*, makes certain regulations which prove the existence of *firmarii* holding for terms of years for a specified rent.

In those statutes, which are unquestionably authentic, com-
mencing with the reign of James I., although there is no express
mention of farmers, yet there are provisions from which their
existence is to be inferred. Among the other judicious laws of
James I. there are several relative to agriculture which indicate an
intention, not only to benefit the country at large, but to protect
the welfare of the cultivators.³ The free cultivators were, by this
time, gradually increasing in number, and rising into importance,
as the enactment, some years afterwards, of the noted Statute 1449,
sufficiently proves. From two statutes of James I.⁴ it is to be
inferred that the farmers employed labourers under them; for the
statutes provide that persons who, by reason of their "simple es-
tate," should labour, should find for themselves "maisters," or "fasten
them to lawful crafts." While the latter branch of the provision
is obviously applicable to handicraftsmen within the burghs, the
former, by contradistinction, appears to apply to country labourers;
and the position is confirmed by the description of labour which
they are enjoined to perform.

These enactments are corroborated directly by the contemporary documents which shall be immediately examined, and by the canons of the Church of Scotland, and indirectly by the notices contained in the history of the period. The 17th canon of the Provincial Councils of Perth, held in the years 1242 and 1296,⁵ is entitled *De*

¹ Stat. Alex. II. c. 18. Hailes, vol. i. p. 429, has a dissertation on this statute, from which it appears that the *maneleta* or gild was the corn-marygold, from which great evil was apprehended in the thirteenth century.

² Balfour, 536.

³ 1424, c. 19, 20, 40; 1426, c. 81.

⁴ 1424, c. 40; 1426, c. 66.

⁵ Wilkin's Concil. Maj. Brit. p. 607. Hailes' Ann. vol. iii. pp. 174-5.

locato et conducto. It makes provision for the periods for which it shall be lawful for ecclesiastics to grant leases to laics *ad firmam*, and the duration is limited to five years. No express mention is made by the historians of the period of the exact condition of the agricultural population, or of the tenures under which lands were [53] cultivated. There are, however, indications that in some parts of the country culture was in a state comparatively advanced,¹ and that the husbandmen and cultivators were in possession of the implements necessary for the purposes of tillage.² The extent of cultivated land and the great consequent quantity of produce, about the middle of the 14th century, are satisfactorily established by the accounts of the Chamberlain of Scotland.³ Wherever cultivation is found to be ample and good, and the cultivators are themselves the possessors of the implements, it may safely be inferred that their tenures are such as to insure for them an adequate return, and that, as far as the state of society permits, they are independent of the arbitrary will of the proprietor. On combining all the evidence the existence of free cultivators is undeniable; but their number and the extent of land possessed by them are left in obscurity.

Written
leases.

II. The existence of those free cultivators, possessing for a specific term and return, almost necessarily involves the existence of a written title. Accordingly, there were, from a very early period in Scotland, leases similar to those in use on the Continent and in England. Almost the only examples of them are to be obtained from the Chartularies, in which were engrossed the deeds granted to the ecclesiastics as well as those granted by them.

The subject shall be examined with relation, *first*, to the parties; *second*, the subject-matter; *third*, the stipulations; and, *fourth*, the form and tenor of those ancient leases.

Parties:
Ecclesiastics.

1st, In the great majority of instances, the lessors were the ecclesiastical corporations, whose establishments, situated in the most fertile districts of Scotland, and containing extensive tracts of territory, contributed more than any other cause to the increase and improvement of agriculture in all its departments. The Scottish ecclesiastics were liberal landlords, judicious and ingenious improvers, and accurate conveyancers. But there also occur leases granted by laymen of different ranks, which, it is to be presumed, were prepared by ecclesiastics, who alone possessed the competent

¹ Hemingford, vol. i. p. 160. Hailes' Ann. vol. i. p. 379.

² Fordun, b. xiii. cap. 18, vol. ii. pp. 296-7. Hailes' Ann. vol. ii. p. 328.

³ Accounts of the Chamberlain of Scotland, from the originals in the Exchequer, published in 1771.

knowledge and skill. One of the oldest leases upon record, dated 1190, is granted by Robert de Kent and other laymen to the Abbacy of Kelso.¹ The lessees were occasionally men of rank and occasionally other ecclesiastics;² but more generally persons who are described by name merely, without any mark by which their station can be ascertained, and who therefore, it may be presumed, were [54] ordinary *firmarii*, as in the feudal ages distinctive titles were carefully given when they existed.³ In later times, 1484, there are leases "*assedationes*," granted to persons who are expressly called *husbandi*, *firmarii*,⁴ and *cottarii*.⁵

2d, Arable or pasture lands formed the principal subject-matter of the contracts or grants. Those of the *husbandi* were called husband-lands. Each of the *husbandi* held a definite portion consisting of two oxgangs, and which, although it might vary according to the soil, was estimated long ago in the South of Scotland as amounting to twenty-six acres. The *cottarii* possessed portions of land varying from one acre to nine acres.⁶ There were also various other subjects. There were leases of mills⁷ and of brew-houses,⁸ houses with crofts or small portions of land attached,⁹ houses within burgh,¹⁰ and also of workshops within burgh,¹¹ teinds,¹² annualrents,¹³ revenues, and customs.¹⁴ From a very ancient lease, it may be inferred that woods were occasionally let for the purposes of sale; for while, by the lease, permission is granted to use the wood upon the lands, it prohibits the lessees from selling it; from which it may be conjectured that such sales were practically known.¹⁵

Subjects of
early Scot-
tish leases.

¹ Chart. Kelso, No. 252.

² Chart. Arb. vol. ii. No. 138. Chart. Coldst. No. 60.

³ Chart. Kelso, Melrose, Arbroath, Moray, Dunfermline, Aberdeen, Holyrood, Soltra, Coldingham, Coldstream, & al. *passim*. Special references have not been deemed necessary, as the instances are so numerous; but the fact will be established by an examination of the Chartularies under the deeds styled *Conventio*, *assedatio*, and occasionally *Charta*.

⁴ Chart. Arb. vol. ii. Nos. 330, 353.

⁵ Preface to Chartulary of Kelso, p. 36. The *husbandi* and *firmarii* probably existed in earlier times.

⁶ Preface to Chartulary of Kelso, pp. 36-7.

⁷ Chart. Kelso, Nos. 16, 19. Chart. Arb. vol. ii. No. 138.

⁸ Chart. Kelso, *ut sup.*

⁹ Chart. Kelso, No. 50, ann. 1366.

¹⁰ Chart. Arb. vol. ii. No. 134, ann. 1433.

¹¹ Chart. Arb. No. 110, ann. 1329. Although these two leases are styled

assedationes, and the words distinctive of leases, "*demissio ad firmam*," are used, they cannot properly be deemed leases, as they are granted in perpetuity. An example of a similar style is afforded by a document engrossed in the Chartulary of Balmorinach (Balmerino), which is entitled "*assedatio*," made to William Wellyeuth and his heirs. But it is really a grant in feu; for it bears, "*concessio ad ad feodo firmam demissio*," and "*in perpetuo feodo et hereditate*." Printed Chartul. of Balmorinach, pp. 42-3. These examples show that the lease and feudal grant were occasionally confounded.

¹² Chart. Kelso, No. 338, ann. 1281.

¹³ Chart. Arb. vol. ii. No. 163, ann. 1453.

¹⁴ Chart. Dunferm. Nos. 303, 287, ann. 1460. Although the latter is styled an *assedatio*, and the revenues are devised *ad firmam* for a specific rent, yet, being in perpetuity, it cannot justly be deemed a lease.

¹⁵ Chart. Kelso, No. 252, ann. 1190.

given in the preamble, this fact establishes the depressed state in which the cultivators then were. Different theories have been suggested in order to shew the reason of this iniquitous practice. One of them is, that the crop and stocking were literally deemed to be the property of the landlord.¹ Another is, that the landlords having still large portions of the lands cultivated by themselves, their creditors, when poiding, refused to make any distinction betwixt those portions and the lands under lease.²

Whichever of these theories shall be thought correct, the poverty of the tenants, and the oppression to which they were subjected, are equally marked. The remedy given by the statute is, that no creditor of the landlord shall be entitled to distrain the tenant's effects "farther than his terme's mailles extends to." No historical evidence is extant, by which the operation of the statute
 1503, c. 93. is known. But from a subsequent statute, 1503, c. 98, the tenants appear to have been liable to have their plough-goods poided during the season of tillage. There is no reason, however, for supposing (the words being general) that this distress was occasioned by seizure for the debts of the landlord. A remedy was provided; for that statute prohibits all officers of the law from distraining horses, oxen, or other goods [61] pertaining to the plough, during the season of tillage, if a sufficiency of other goods is to be found upon the lands.

1491, c. 26. The Statute 1459 protected tenants against purchasers or other singular successors; but it did not protect them against the superior, if his vassal, the lessor, was in non-entry. The lease was held to be dormant during the period of non-entry, and to revive when the vassal entered. The severity of this feudal rule was, by the Statute 1491, c. 26, so far relaxed, that the tenant could not be removed until the subsequent Whitsunday, he paying to the superior the rent which was due.

Leases of
15th and
16th cen-
turies.

During the latter part of the 15th and the earlier part of the 16th century, the tenor and conditions of the lease do not appear to have been materially different from their state during the preceding period. This has been already shewn by references to numerous leases of that era. The advantages accruing from leasing lands had begun to be manifest. In one instance the whole demesne of an abbey was let to different husbandmen; from which it appears that, as society advanced, the churchmen, who were the most intelligent cultivators, found it beneficial to abandon the plan of cultivating by their servants and to let on lease even the lauds

¹ Kames' Hist. Law Tracts, pp. 164-6

² 2 Ross's Lect. 477-8.

situated around their residences.¹ The leasing of the lands of churchmen appears, accordingly, to have been managed upon system. Detailed "Rentals" were framed, in which were engrossed the lands and other subjects let, the terms of duration, and the rent, which consisted either of money, or produce, or services. These "Rentals" were occasionally written not in Latin but in Scotch, which, combined with the use of the same language in the descriptions of the leases themselves, tends to prove that the contracts and relative dealings had become more numerous and had extended more generally among a class of the population who were acquainted with their native language alone.²

While a detailed account of the clauses of the lease of the 16th and 17th centuries would be superfluous, a brief one is necessary. From the treatises of Balfour and of Craig it is ascertained that the general tenor and stipulations were the same as they had always been, and as they are now, with those variations which the advancing state of agriculture gradually introduced. Although this general knowledge of their purport existed, their precise tenor was imperfectly known until recently, when important information has been imparted by the publication of a series of tacks or leases extending downwards from the year 1586.³ These leases embody cultivation clauses, of which, although there are variations, [62] the ordinary purport is that the tenants shall till the lands for three years. They were obliged to keep the fodder and grown stuff upon the ground and "not take away the same." There is an obligation to uphold and keep the "houses, biggings," and the like in "timber, thack, and riggings" during the tack. And because the tenants received the fulzie at their entry "as sighted be ye birley men," they shall leave the fulzie at the expiration subject to the same inspection, receiving compensation if the fulzie be found better, and making up for the deterioration if it be found worse. There is also an obligation to plant their "yards with trees" which the master is to furnish. This is said to have been a customary obligation in leases at that time, and hence exist the groups of old timber trees which are around farm buildings. The rent ordinarily consisted of a small sum of money or mail yearly, payable at Whitsunday and Martinmas, of victual, of kain, and of services of various kinds.

Among other services is that of leading a large number of loads *Services.*

¹ Chart. Arb. vol. ii. No. 230, ann. 1484.

² Printed Chart of Moray, preface, pp. 19, 20, 22. Chart of Dunferm. pp. 425-62, 465-7, 491, *Annis* 1567-1586.

Innes' Scottish Legal Antiq. pp. 248, 249, &c.

³ Caldwell Papers, part i. p. 273 *et seq.*, printed by the Maitland Club.

years' duration, without the Queen's license. The Statute 1594, c. 200, [68] debarred "beneficed men" under the degree of prelates from letting leases for more than three years without the patron's consent.¹ At this period rental rights do not appear to have been comprehended under grants which a bishop might lawfully make.²

1617, c. 4. By the Act 1617, c. 4, prelates were restrained from granting leases of any part of their "patrimoine" for more than nineteen years; and inferior beneficed persons for more than their own lives and five years after their decease, under the sanction of deprivation and other penalties; and, to insure discovery, all longer leases were to be recorded within forty days, under the sanction of nullity.³ Leases beyond the prescribed period were not held to be null, as the sanction was not the nullity of the deed, but the deprivation of the grantor.⁴ Although registration in a book to be kept for the purpose was enjoined, registration in the Books of Council and Session was accounted sufficient.⁵ From that statute were excepted leases granted by order of the Commissioners for the plantation of Churches.⁶

Inferior churchmen having, under pretence of the Act 1617 granted leases for the prescribed period without the consent of their patrons, the remedial Statute 1621, c. 15, was passed. By it the intendment of the Act 1617 was declared to have been, that the consent of the Chapters to leases by prelates, and of the patrons to those of the inferior clergy, was not abrogated; but that, even with that consent, the former could not grant leases beyond nineteen years, nor the latter for more than five years beyond their own lives; and, by a retrospective clause, all leases granted without the requisite consent since 1594 were declared null.⁷ The nullity was not absolute, for such leases were sustained for three years.⁸ A temporary Statute, 1563, c. 77, debarred the feuars, or "takers of lang tackes of kirk-lands," from removing kindly tenants for a limited period after the passing of the Act.

In their complaint against the dilapidation of benefices (1578) the Reformed clergy set forth, that "we desire all alienations by

Statutes
against
dilapidation
of benefices.

¹ 2 Craig, x. i. 1 Stair, x. 19. 2 Bank. viii. 116. 2 Ersk. x. 8.

² Laird of Lee v. Tenants of Carstairs, 1613; Mor. 15,183.

³ Mackenzie's Ob. 342-4. 2 Stair, x. 19. Forbes on Tyth. 154. Pardovan's Col. b. ii. t. xiv. sec. 5. 2 Bank. viii. 116. 2 Ersk. x. 8.

⁴ Mackenzie's Ob. 342. Forbes on Tyth. 155. Hope v. Minister of Craig-hall or Kinnaird, 1824; Mor. 7943.

⁵ Mackenzie's Ob. 342. Forbes on Tyth. 155. Hope v. Minister of Craig-hall, *ut sup.*

⁶ Mackenzie and Forbes, *ut sup.*

⁷ Mackenzie's Ob. 362 and 342-4. 2 Bank. viii. 116. 2 Ersk. x. 8.

⁸ Mackenzie's Ob. 286. 2 Stair, viii. 19. 2 Ersk. x. 8. Forbes 157. Johnston v. Parishioners of Houndon or Howden, 1668; Mor. 6848.

feus or leases of the rents of the Church, as well lands as tithes, in diminution of the old rentals, to be reduced and annulled, and the patrimony of the Church fully restored."¹ Two Statutes, 1563, c. 72, and 1572, c. 48, had been previously passed, for securing to them [69] the possession of the manses and glebes, or an equivalent. But leases of extraordinary duration were accounted alienations, and were therefore not valid against successors.² Comprehensive statutes against dilapidations were subsequently passed. The Act 1581, c. 101, debarred churchmen under the degree of bishops from granting leases with "diminution of the rental," under the sanction of deprivation and of the nullity of the lease. And by the Statute 1585, c. 11, all ecclesiastical persons presented by the King were ordained to find caution to leave their benefices at their decease or demission without diminution of the yearly rent; and if, by leases or changing victual for money, the rents should be impaired, all such deeds were declared to be null; which act was ratified by the Statute 1606, c. 6.³ Although the latter statute was in terms directed only against Crown beneficiaries, *de praxi* it included all beneficiaries presented by subjects, either laics or ecclesiastics.⁴ Under these statutes, bishops reduced leases granted by their predecessors, because there was a diminution of the rental by converting grain into money. But it was decided that this nullity⁵ was competently pleadable by reduction only, and not by exception.⁶

If a prelate, even with the consent of the majority of the chapter, granted a lease for rent, and afterwards assigned the rent to the lessee, the lease was held to be invalid.⁷ But there was no dilapidation where there was obtained the same rent as before 1606.⁸ Nor could a bishop let a new lease before the expiration of the preceding one.⁹

Dirleton raises the question, *1st*, Whether a renewal of a lease for the rent payable for the preceding one amounted to dilapidation?

¹ Book of Discipline, c. 12, art. 16. Spott. Ch. Hist. 301.

² Balfour, 203. 1 Craig, xi. 5. Per Lord Redcrosse in D. of Queensberry's Tra. v. E. of Wemyss, 5 July 1813, 2 Dow, 119; 5 Pat. 758.

³ 2 Stair, x. 18. Mackenzie's Ob. 201-18. Dirlet. Doubts and Steu. Ans. p. 102. Forbes 139-40. 2 Bank. viii. 116. 2 Ersk. x. 8.

⁴ Mackenzie's Ob. 218.

⁵ Bishop of Ross v. Drummond, 1634; Mor. 15,216. Bishop of the Isles v. Stuart, 1683; Mor. 7956.

⁶ Bishop of Edin. v. Brown, 1636; Mor. 2719-20.

⁷ 2 Craig, x. 2. Forbes 158.

⁸ Mackenzie's Ob. 202; 27 Jan. 1676, Bish. of Caithness v. Vassals.

⁹ Mackenzie's Ob. 343. Dirlet. Doubts and Steu. Ans. 34. Forbes 153. Bish. of the Isles v. Shaw, 1631; Mor. 5630. For this doctrine both Mackenzie and Forbes rely on the case of the Bishop of the Isles v. Stuart (*vide sup.*) but as reported the case does not seem to have involved this matter; but probably the case of the Bishop of the Isles v. Shaw was intended.

The solution by Steuart, and apparently by Forbes, is in the negative;¹ and it was decided that a beneficed person might, notwithstanding an inhibition, renew leases to a kindly tenant within the years of the old lease.² 2d, Whether a prelate could accept of the renunciation of a current lease, and grant a new one? The answer is in the negative,³ on the principle that he [70] could not injure his successor. It was decided that if he survive the expiration of the previous lease the new one will subsist.⁴ But it appears to have been deemed that, after recommendation to another see a prelate could not grant a new lease.⁵

Canon law
required
consent of
chapter.

By the Canon Law the consent of the chapters and of the conventual brethren was requisite to render valid the grants of bishops and of the heads of religious houses;⁶ nor, even with that consent, was the grant valid unless advantageous.⁷ Numerous instances have been already given of the recognition of those rules by the law of Scotland. The preamble of the Act 1606, c. 3, sets forth that conformably to the statute and common law it was indispensable that the "setting of tacks by prelates should have the consent of the maist part of the chapter," or otherwise be invalid; and the rule was ratified by that Statute and the Acts 1617, c. 4, 1621, c. 9, and c. 15. In consequence, it was held to be undoubted law during the subsistence of both the Roman Catholic and Protestant prelacies,⁸ and a lease granted without that consent was reduced.⁹

The consent of the bishop and chapter was also requisite to authorise the deeds of individual members relative to their particular benefices;¹⁰ but it was decided that the Chapter of St Andrews was, by the Act 1606, c. 2, exempted from the rule, and that any member "may set tacks," without the consent of the archbishop.¹¹

How adhi-
bited or
proved.

Anciently the consent was adhibited by the prelate or superior, in a chapter solemnly convened, appending the common seal.¹²

¹ Dirlet. and Steu. 102. Forbes 150.
² Bandene v. Ballegerno, 1603; Mor. 7016.

³ Steu. 84. Forbes, 153.

⁴ Steuart 34.

⁵ Mackenzie's Ob. 343. Forbes 154.

⁶ Decretal, l. 3, t. 10, c. 4.

⁷ Concilia, 12, t. ii. c. 52.

⁸ Balfour 203-4. 1 Craig, xiii. 14, 15, 16; 2 x. 1. 2 Stair, viii. 16, 17. Mackenzie's Ob. 342-3. Forbes, 152-3, 310-12. Hope's Min. Prac. with Spotts. Notes, t. ii. sect. 26; Note, sect. 26. Mackenzie's Ob. 339. 2 Bank. viii. 114-15-16. 2 Ersk. x. 5.

⁹ Cheyne v. Coulter, 1629; 1 B. S. 179.

¹⁰ Bank. viii. 114-16. 2 Ersk. x. 5.

¹¹ 2 Stair, viii. 17. Spotts. vocs Kirkmen. Forbes, 149, 312. 2 Ersk. x. 5. Coll. of Aberdeen v. Menzies, 1629; Mor. 7945. Coll. of Aberdeen v. L. Fraser, 1637; Mor. 7948. Coll. of Aberdeen, v. L. of Muchall, 1637; 1 B. S. 358.

¹² 19 Nov, 1624. Mackenzie's Ob. 340. 2 Stair, viii. 17. Hope, Teinds. Tenants of Craighall v. Kinninmont; Forbes, 149, 312.

¹³ 1 Craig, xiii. 16. Forbes, 147.

When (with the exception to be afterwards noticed), sealing, as of itself complete authentication, fell into desuetude, it was held requisite before the Reformation that the consent by the subscriptions of the individual members should have been given at a *pro re nata* meeting of the chapter;¹ but, in consequence of the subsequent statutes, the consent, at whatever time adhibited, was held sufficient.²

Although a member of the chapter subscribed a lease, not formally as a consenter, but as a witness only, he was held to have [71] consented;³ and it was doubted if a bishop could, after coming into the see, impugn a lease to which he had consented while a member of the chapter;⁴ but no subscription given by consenters after the death of the principal granter was included.⁵ The votes were counted, not according to the number of beneficiaries, but of benefices, so that one beneficiary holding two benefices had two votes.⁶ Where a convent consisted of eight persons, the consent of a majority, and not merely of the provost and three prebendaries, was held to be necessary; but neither the consent of minors, nor of those absent from the country was requisite; and if all the members were minors, there was no need of the consent of any of them.⁷

During a vacancy of an episcopal see, the chapter represented the bishop;⁸ but in Scotland that right was confined to acts of ordinary administration, as "letting a lease for a moderate endurance, and removing tenants."⁹

Nor, though the common seal was no longer of itself sufficient, did it fall into disuse. Stair says that there was necessary the consent of the majority of the chapter, "with the seal."¹⁰ Although not expressly said by Craig, the same doctrine may be inferred;¹¹ but it does not seem to be noticed in the other books. And where the ground of reduction of a lease was, that the common seal of the convent was not appended, (there being no common seal), the Court of Session declined to decide, but referred the matter to the Bishop of Glasgow.¹² There were cases in which the seal was, by

¹ 1 Craig, xiii. 14.

² Craig, *ut sup.* 2 Stair, viii. 16.

³ Bank. viii. 115. Forbes 147. 2 Erak. x. 5.

⁴ B. of the Isles v. Shaw, 1631; Mor. 5,630.

⁵ Mackenzie's Ob. 343. Forbes 154.

⁶ 1 Craig, xiii. 14. Forbes 147-313.

⁷ 1 Craig, xiii. 14. Mackenzie's Ob. 340. Forbes 147-313.

⁸ 2 Stair, viii. 17. Mackenzie 339.

Forbes 146-311. Maxwell v. Drumlanrig, 1632; Mor. 7941-5.

⁹ Decretal, l. t. 8, c. 3.

¹⁰ 1 Craig, xiii. 16. Hope's Min. Prac. t. ii. sect. 25, note. Forbes 149-56. 2 Erak. x. 6. Erakine v. Pitcairn, 1566; Mor. 7962.

¹¹ 2 Stair viii. 16.

¹² 1 Craig xiii. 15.

¹³ Hewit v. E. Cassilis, 1614; Mor. 7941.

itself, complete evidence of consent. By the Statute 1606, c. 3, the appending of the common seal of the Chapter of St Andrews was declared to be "ane sufficient and perfite consent of the Chapter," and "effectual for securing of the vassals and tennents;" and this privilege was practically recognised.¹ If a chapter or convent had ceased to exist, appending the seal and the royal confirmation were sufficient.²

When it was intended to reduce a lease because it had been granted without the consent of the chapter, the mode of libelling the action was to set forth that there were so many of the chapter living (naming them in the libel) who had not subscribed the deed. [72] But although this was held to be the general rule of law, the Court, in the actual case, allowed the bishop to amend the libel.³

Consent of
patron
necessary in
some cases.

As already shewn in part, leases beyond a certain duration granted by the inferior clergy required by statute the consent of the patron; and this continued to be the practical rule.⁴ When conventual benefices had patrons, their consent, as well as that of the members, was necessary.⁵ The rule was held to include provosts and prebendaries, because he only was a prelate who had a chapter.⁶ The patron's consent by previous subscription was not necessary, but might be given by subsequent subscription or acts of homologation; and acceptance by the patron of an assignation to the lease, followed by a decret of prorogation, was held to be sufficient consent.⁷ It was argued, but not decided, whether a commission to let leases granted by a patron to a parson was sufficient.⁸ The objection arising from absence of consent might have been pleaded by a third party, as by an heritor pursued upon a lease thus defective.⁹ But where a lease granted without the patron's consent had been assigned, and only the assignee, but not the cedent, had been called, reduction was not admitted.¹⁰

Leases for
incumbent's
life.

In leases to endure only for the incumbent's lifetime, neither diminution of the rental nor want of consent was held to be a valid objection; for he might grant such leases on whatever terms

¹ 1 Craig, xiii. 15. Hope's Min. Prac. t. ii. sect. 25. ² Stair viii. 17. Mackenzie's Ob. 340. Forbes 147.

³ 1 Craig, xiii. 16. Hope's Min. Prac. t. ii. sect. 25. Mackenzie's Ob. 340. ⁴ Stair, viii. 16.

⁵ B. of the Isles v. McLean, 1631; Mor. 5630, 15, 170.

⁶ Balfour 204. 1 Craig xiii. 11, and 2 x. 1. Mackenzie's Ob. 341-3. ⁷ 2 Stair viii. 17. Forbes 155, 313. ⁸ 2 Bank viii. 116. ⁹ 2 Ersk. x. 8.

¹⁰ 1 Craig xiii. 11.

¹¹ Mackenzie's Ob. 343. ¹² 2 Stair, x. 19. Drumlanrig v. Cowhill, 1616; Mor. 7941.

¹³ 2 Stair x. 19. Forbes, 157, 314. ¹⁴ E. Athol v. Robertson, 1669; Mor. 7084.

¹⁵ Parson of Moreham v. Beuford or Beinstoun, 1666; Forbes 168-7.

¹⁶ E. Athol v. Robertson, *ut sup.* ¹⁷ Murray v. Mackenzie, 1630; Mor. 2214.

he pleased, which, although ineffectual against his successors, were binding upon himself.¹ But religious houses and their pertinents could not be let on any terms.²

Leases granted by churchmen are said to have been valid against Possession. their successors (in so far as the law permitted), although not followed by possession.³

¹ Balfour, 204. Dirlet. and Steu. 89-90. Vicar of Bowten v. Cockburn, 1566; Mor. 7935. Parishioners of Cumnock v. L. Caprington, 1583; Mor. 7936.

² Balfour 203. 1514, Abbott of Crossraguell v. Hamilton; Mor. 7933.

³ Dirlet. and Steu. 412. 2 Bank. ix. 18.

PRELIMINARY CHAPTER.

1. A Lease is a contract of location, by which the use of land, or any other subject which yields profits, is given for a definite period, and in consideration of a certain return in money, produce, or services.¹ The grantor and receiver of the lease are, in technical language, called Lessor and Lessee, and, in common parlance, Landlord and Tenant. *Definition of lease.*

2. The nature and effects of this contract will be discussed under six general heads, each of which will form a Book, and each Book will be subdivided into Chapters, Sections, and Articles, embodying the details. *General exposition of the tenor of the treatise.*

The *First* Book will contain a description of the parties who are capable of entering into the contract. Under the description of the Lessor there will be examined his powers, and the restraints and disabilities which arise from natural or legal incapacity, and from the full or limited nature of his right. There will be considered, under the discussion of Lessee, the corresponding powers and disabilities arising from those personal causes on which the validity or invalidity of the grantee's right depends. *Book I.*

When the character and rights of the parties shall have been ascertained, the next object is to determine what those subjects are with relation to which they can lawfully contract. The *Second* Book will therefore contain a development of the subject-matter, including not only immoveable subjects, but those other subjects which, by yielding profit, may, and often do, come under the operation of this contract. *Book II.*

The next step is the mode by which parties, when they shall

¹ Dig. lib. xix. tit. ii. Voet. ad Pand. lib. xix. tit. ii. Vinn. ad Inst. lib. iii. tit. 25. Puffendorf, by Barbeyrac, lib. v. chap. vi. Wissenbachii Exerc. ad Pand. Disput. xxxvii. lib. xix. §§ 11-26. 2 Stair, ix. 1. 2 Mackenzie's Inst. vi. 5. 2 Bank ix. 1. 2 Ersk. vi. 20. 2 Rows' Lect. 456. 1 Bell's Com. 65. Spott. Styl. 360. 1 Jurid. Styl. 4th edition. 455.

- Book III. have selected the subject of the contract, constitute the agreement, [74] so as to render it mutually binding. This discussion will include the style, tenor, and various clauses of the lease; and will form the contents of the *Third Book*.
- Book IV. The *Fourth Book* will be occupied by the examination of the causes and modes by and according to which the contract may be dissolved.
- Book V. By virtue of the contract there accrue to and devolve upon the parties certain mutual rights and duties, which operate during the subsistence of the contract, and may produce legal results after its dissolution. The *Fifth Book* will consist of a detailed delineation of those rights and duties.
- Book VI. Not only are certain rights and duties conferred or imposed upon the parties themselves, but there are others which may affect third parties, arising from the insolvency or bankruptcy of both or either of the parties to the contract. The rights of the creditors of the lessor amongst themselves, or as affecting the interests of the lessee, and the rights of the creditors of the lessee amongst themselves, or as affecting the interest of the lessor, will be embodied in the *Sixth Book*.

BOOK I.

LESSOR AND LESSEE, OR BY AND TO WHOM A
LEASE CAN BE GRANTED.

CHAPTER I.

INDIVIDUAL PROPRIETOR IN FEE-SIMPLE.

SECTION I.—MAJOR.

EVERY person who is the proprietor of a subject, or has a right to the full use and possession of it, or is the administrator of it, and is twenty-one years of age, and under no natural or legal incapacity or limitation, can grant a lease upon whatever terms for rent or grassum, and for whatever duration he thinks proper.¹ But there are certain disabilities arising from natural or legal incapacity.

1. **BLINDNESS.**—Formerly the validity of any deed, and therefore of a lease, granted by a blind person, depended upon proof by the user that it was subscribed by notaries, and read to the grantor.² Where the grantor can and does subscribe, the deed will be valid if proved that, although not read to him, he *aliunde* understood its contents.³

Art. 1.—
Natural In-
capacity.

2. **DEAFNESS AND DUMBNESS.**—The validity of deeds granted by persons born deaf and dumb involves matter of difficulty. By the Roman law, such persons were deemed incapable of contracting, and put under curacy.⁴ In the treatises of foreign jurists many nice

¹ 2 Ersk. vi. 21. Bell's Pr. § 1181.

² Ross v. Aglionby, 1792, Mor. 16,853. E. of Fife v. Fife's Treas., 30 Nov. 1819, F. C. 38.

³ Fife v. Fife's Treas., as revd. 17 July. 1823, 1 S. App. 498. [See Menzies' Lect. 109. Montgomerie Bell's Lect.

44.] 3 Ersk. ii. 9, Notes (by Ivory) 39, 42. More's Notes, p. cccxli.

⁴ Inst. l. i. t. xxiii. 4. Dig. l. xxvi. t. v. c. 8, s. 2. Dig. l. 50, t. xvi. c. 246. Cod. l. vi. t. xxii. c. 10. Vinn. ad Inst. l. i. t. xxiii. s. 4. Hein. ad Pand. p. 5, s. 60.

distinctions are taken between the capacity and powers of persons who are born deaf and dumb, and those who become so by accident; [76] and also among the various contracts which they are or are not capable of making. But the general result of their doctrine is in favour of the power of contracting, modified by the degree of intelligence of the party.¹ Michalorius holds that deaf and dumb persons are obliged, by paction, to pay the rent of a house let to them, into which they have carried goods;² thus explicitly giving them the power of entering into the contract of lease as lessees, and, *e converso*, they may be lessors.

Law of Eng-land. According to the law of England, persons born deaf and dumb and blind are deemed to be in the same state with idiots.³ A man deaf and dumb from his birth is in presumption of law an idiot. But if it be proved that he has the sense to understand the nature and effect of a contract, he can validly contract.⁴ In one case, however, a transaction, although reasonable in itself, was set aside, because the party had not the assistance of an able and faithful relation.⁵

Older Law of Scotland. The doctrine of the older law of Scotland resembled that of Rome. Balfour classes deaf and dumb persons with pupils, with "fules without discretion or judgment," and with persons under incapacity from crime.⁶ Dallas refers to the brief of "deaf and dumb" along with that of idiocy and furyosity.⁷ The same doctrine is laid down generally in the Books.⁸ These principles were carried practically into operation. The consent of a dumb man was not inferred from his subscribing a discharge by the initial letters of his name; the money for which it was granted being delivered, not to himself, but to his sister in his presence.⁹ But Craig, Stair, and Bankton, each in one passage, appear to have been of opinion that the intelligence of the party was to form the measure of the validity of the transaction.¹⁰

¹ Michalorius de Casco, Surdo et Muto, cap. xxxvii. xxxviii. xlii. lii. lxx. Strykius de Jure Sensuum. Disserta. iv. cap. iii. de Jure Surdorum et Mutorum. Berger. Dissertationes, pp. 216, 394, 578.

² Mich. *ut sup.* cap. xxxvii.

³ Coke upon Litt. 42, B. Shelford on Lunatics, 2d edit. p. 3.

⁴ Shelford, 2d edit. pp. 3, 4, 325, 561, 618. Elliot's case, Carter 53. Dickenson v. Blisset, 1 Dick. 268. Vin. Abr. Tit. "Fine," D. (10), pl. 9, 10. Griffin v. Ferrers, Barnes 19. Keys v. Bull, id. 23. Altham v. Smith, Cary, Rep. 93. Toth. p. 140. Wy. Pr. Reg. 292. Swinburne on Marriage, sec. 15.

Ruston's case, Leach. Cr. L. 455, sec. 1. Phillips on Evid. 18. Peake on Evid. 127.

⁵ Shelford on Lun. 325. Ferres v. Ferres, 2 Eq. Cas. Abr. 695.

⁶ Balfour, 298, c. iii.

⁷ Dallas, 593.

⁸ 2 Craig, i. 12. Stair, i. vi. 25; iv. iii. 9; and xi. 66. 1 Bank. vii. 11. Wallace, Inst. xvii.

⁹ Hamilton v. A dumb man in Glasgow, 1663, Mor. 6300. Stair, i. x. 11, refers to this case under the name of Hamilton v. Edale.

¹⁰ 1 Craig, xii. 27. 1 Stair, x. 13. 1 Bank. xi. 66.

In a case comparatively recent, a distinction seems to have been taken between the powers of contracting legally belonging to persons deaf and dumb, and to those in a state of idiocy. A person was cognosed to be deaf and dumb, and was thence held to be incapable of managing his affairs. The act of cognition being recognised [77] as legal, proves that the law held the existence of incapacity. Having subsequently entered into marriage, a process for annulling it was instituted, in which proof was adduced that he was an idiot. A distinction was conceded, according to which a cognition that the party was deaf and dumb was held to imply a smaller degree of incapacity than would have arisen from a cognition for idiocy.¹

In modern times the legal incapacity arising from this cause ^{Modern law} has been greatly modified. Erskine, while he does not expressly deny the doctrine of the older books, evidently questions its soundness, and adduces strong practical examples to the contrary.² In a modern case it was, after solemn deliberation, decided that deaf and dumb persons can be tried for crimes.³ The present rule of law is understood to be, that there is a *prima facie* presumption against the deed of a deaf and dumb person, which presumption the user is bound to elide by proving the capacity of the granter.⁴ But if the capacity of the granter be conceded, the deed will be valid. A trust was constituted in a postnuptial contract in favour of a wife who was deaf and dumb, but capable of acting for herself, and of the heirs of the marriage. The husband died, and the only heir of the marriage attained majority. It was held, that although there was no provision in the deed for the trustees denuding in the event which had occurred, yet that the widow and the heir were entitled to require the trustees to denude, in respect that the only legal interest in the estate was so vested in them according to their respective rights, that being both *sui juris*, they were *in titulo*, by their joint act, to discharge the trust.⁵

3. INSANITY AND FATUITY.—Insane or fatuous persons (comprehending under the terms insanity and fatuity the various kinds of mental alienation) cannot grant a lease.⁶ Where there is a verdict of cognition, the verdict reverses the ordinary legal presumption in

¹ Blair v. Blair, June 1748, Mor. Ch. 532, 544. Kirkpatrick, June 8, 1853, 15 D. 734.]

² 1 Ersk. vii. 48; iii. i. 16.

³ L. Adv. v. Campbell, 17 July 1817.

⁴ Hume's Crim. Law, 44, note 2.

⁵ Inform. for L. Adv. in Campbell's case, *passim*. [See Fraser on Par. and

⁶ A. & W. Craigie v. Gordon, 17 June 1837, F. C. 1084, 15 S. 1157; see Note of Lord Moncreiff.

⁷ 1 Craig, xii. 28. 1 Stair, x. 13. 1 Ersk. vii. 49, 50, 51.

favour of the deed.¹ And the same rule would hold where upon investigation the Court of Session had declared the incapacity and appointed a curator. Where the deed has been executed prior to such a verdict or judgment, it is reducible on subsequent proof of the incapacity.² Conformably to this rule, it having been found by a verdict upon a brief of idiocy that the party had been an idiot from a certain period, it was decided that a lease granted by him [78] within the time specified was null.³ But a lease would be valid until reduced. For it was long ago decided that a rental-right granted by an insane person must be reduced, and cannot be found null by exception.⁴

In the temporary mental alienation produced by intoxication, the rule is, that the lease or other contract shall be null if the intoxication be absolute.⁵

4. INTERDICTION.—Where, from facility or prodigality, interdiction, judicial or voluntary, is imposed, the deeds of the person interdicted, granted without the interdictor's consent, are not null, but reducible if they be not onerous or rational, and if lesion be proved.⁶ According to an old decision, an interdicted person could not grant a lease even to a kindly tenant;⁷ and Stair seems to sanction the doctrine.⁸ But now the lease will be sustained, if rational and onerous, and within the powers of ordinary administration; but will be reducible when otherwise. A lease for three nineteen years, renewable from time to time on payment of a small grassum, and of a rent of £14 for the first nine years, and of £15 for the remaining period, was on proof sustained, but reduced *quoad ultra*.⁹ But a lease of his whole lands (previously let to tenants) granted by a liferenter, under interdiction, in security of a debt in favour of one of his interdictors, and which was consented to by the other interdictors, was reduced, because it was not an onerous and rational deed.¹⁰

[79] FORFEITURE.—The most important civil disability arises from the commission of high treason, by which the estate of the traitor is forfeited, and becomes vested in the Crown.¹¹ If a person remain

¹ Ersk. *ut sup.* 50, note. 1 Bell's Comm. 137.

² Ersk. *ut sup.* 51, and note (by Ivory) 243.

³ Maxwell v. Bonar, 1704, Mor. 6288.

⁴ Crauford v. —, 1683, Mor. 6275.

⁵ 1 Stair, x. 13. 1 Bank. ix. 66.

⁶ Ersk. iii. 16. 1 Bell's Com. 297. Halton v. Northeak, 1672, Mor. 13,384.

⁷ 1 Stair, vi. 41. 1 Mackenzie's Ins. vii. 16. 1 Bank. vii. 126, 130; xi. 66.

1 Ersk. vii. 58. 1 Bell's Com. 139-40. Kyle v. Kyle, 14 Dec. 1826, 5 S. 128.

⁷ Douglas v. Cranstoun, 1613, Mor. 7148.

⁸ 1 Stair, vi. 41.

⁹ Kyle v. Ker, noticed in Kyle v. Kyle, *ut sup.*

¹⁰ Fraser v. Fraser, 6 Feb. 1827, 5 S. 301.

¹¹ 1 Bank. iii. 56. 4 Ersk. iv. 24. 1 Hume, 583.

a year under sentence of fugitation, he forfeits to his superior the profits, and consequently the administration of his heritable estate during his lifetime.¹ And Hume says that it is undecided whether the same rule applies in the case of a person capitally convicted, and evading execution of his sentence.² Leases made by a rebel, *stante rebellione*, were found null, by exception at the instance of the Lord Treasurer or the donatar, although no creditor sued.³ But a lease granted before forfeiture will be valid if the rent be sufficient and the duration ordinary.⁴

The legal results arising from fugitation for the crime of murder ^{Fugitation.} were fully considered in a recent case. A party executed a disposition of his heritable property in favour of certain persons *ex facie* absolute, but which the disponees subsequently declared in writing was held in trust for the granter, his heirs and disponees. The granter was afterwards cited to answer before the Court of Justiciary for the crime of murder, alleged to have been committed by him previously to the date of the disposition. He not having appeared, sentence of fugitation passed; and denunciation followed and was recorded. Some years after, when still unrelaxed, he executed a deed instructing his trustees to make a strict entail of his property. It was held, *1st*, That the consequences of a denunciation on a horning are not different from those of fugitation in the criminal court or in any respect less severe, with the exception of the distinctions introduced by statute, or rendered necessary by the different forms of the civil and criminal courts, or by justice and expediency. *2d*, That the fee of the heritage remained with the outlaw; and *3d*, That the outlaw retained every power of disposing of his property, which could be exercised without prejudice to the right [80] of those who might have an interest in his single or life-rent *echteat*.⁵

SECTION II.—MINOR.

A minor of the age of fourteen, without curators, may grant ^{Art. 1.—} a lease, as he may convey heritage; but if there be "enorm lesion," ^{Without} ^{curators.} his deeds are subject to restitution.⁶ Discharges for rent granted

¹ 2 Hume 263. ² Bank. iv. 36, 39, 41. ³ Ersk. 5, 57, 66.

⁴ 2 Hume 464.

⁵ Kennedy v. Kennedy, 1632, 1 B. S. 333.

⁶ 2 Craig, x. 8. 3 Stair, iii. 32. Mackenzie's Obs. 27. More's Notes, cccxii. Home v. Tenants of Oldhamstocks, 1570, Mor. 4685. Balfour, 562, c. vi. Dalziel v. Tenants of Caldwell, 1674, Mor. 4685. M. of Huntly v. Grant, 1677, Mor. 4689.

⁷ McCrae v. Hyndman, 26 Nov. 1836, F. C., 15 S. 54; A.F. 1839, M'L. and R. 645.

⁸ Balfour, 119, c. xxiv. 1 Craig, xii. 30. 1 Mackenzie, 7-9. 1 Stair, vi. 32 and 35, note a. 1 Bank. vii. 55. 1 Ersk. vii. 33. 1 Bell's Com. 134. 1 Bell on Leases, 108. 2 Fraser on Personal Relations, 175. [Par. and Child, 385.] Thomson v. Stevenson, 1668, Mor. 8982; Clerk's Creditors v. Gordon, 1690, Mor. 3668.

by a minor so situated are valid.¹ While in one case² the Court avoided determining the general point whether payment could be safely made to a minor unless by judicial authority, they, in a later case,³ held that such a payment was "valid and effectual." And although in a subsequent case⁴ they would not authorise such a payment, they distinguished between a principal sum and "rents of subjects," holding that the latter might be safely paid, as the receipt of them was an ordinary act of administration which might be necessary for the minor's support.

Art. 2.—
With cura-
tors, but
without their
consent.

Where a minor has curators or an administrator-in-law, a deed of conveyance or a lease granted without their concurrence is held not to be intrinsically null, but challengeable, without proof of lesion.⁵ But it may be observed that Mackenzie holds that such deeds are *ipso jure* null;⁶ Bankton, that they are null, so that there is no occasion for reduction or proof of lesion;⁷ and Erskine, that they are null.⁸

The older law sanctioned the doctrine of nullity by exception. A lease taken by a minor, without the consent of his curators, was, upon exception, held to be as null as if he had made a disposition without their consent.⁹ A lease having been granted by a minor, [81] without consent of his curators, nullity *ipso jure* was pleaded; but the Court, without sanctioning that plea, simply sustained the plea of the nullity of the lease as granted in minority, without consent of curators, although no lesion was established.¹⁰ But upon appeal this decision was reversed. For a lease which in the recital bore to have been granted by a minor with consent of his curators, but was signed only by the landlord, having been followed by long possession, was found to be good.¹¹ The rule is, that the deed being *presumed* to be to the minor's lesion, will be annulled upon exception.¹² But one case appears to be of a contrary purport. A minor having come under an obligation to grant a lease for a small increase of rent, on majority pursued a reduction on the ground of the want of the consent of his curators and on the ground of undervalue. The date of the obligation having been proved to have been at least

¹ 1 Ersk. vii. 33; note by Ivory, 228.

² Hay v. Grant, 23 Feb. 1749, Mor., 8978.

³ Kochler v. Neidrick, 1772, Mor. 8975.

⁴ Kirkman v. Pym, 1782, Mor. 8977.

⁵ Balfour, 119, c. xxiv. 1 Craig, xii. 30, as compared with 2 Craig, xx. 16. 1 Stair, vi. 33. 1 Bell's Com. 134. Lady Cardross v. Repra. of Hamilton, 1706,

Mor. 8951. Harvie v. Gordon, 1726, Mor. 5712.

⁶ 1 Mackenzie Inst. vii. 9.

⁷ 1 Bank. vii. 56.

⁸ 1 Ersk. vii. 33.

⁹ Seton v. L. Cankieben, 1622, Mor. 8939.

¹⁰ Cardross v. Hamilton, *ut sup.*

¹¹ 8 April 1712, Robertson's App. 87.

¹² Harvie v. Gordon, *ut sup.*

five years previous, and the existence of an increased rent having been established, it was decided that, as he had not challenged during so long a period, and had received increased rent during four years after majority, he was bound during the currency of the lease.¹

SECTION III.—COMPLETED OR INCOMPLETED TITLE.

As the granter of a lease is styled the heritable proprietor of the subject let, he must be infeft at the date of the grant. And it has therefore been laid down that an infeftment is the granter's proper title.² The lease will be made perfect by the subsequent infeftment of the granter if there has been no mid-impediment. But the lease will not confer a permanent or effectual right where the granter has not been infeft. And it will be defeated by a sasine previous to that of the granter. It will be defeated by the granter's death uninfeft, if the fental right shall become vested in a stranger who does not represent him, as a substitute in a tailzied succession, or in a purchaser, or in an adjudging creditor.³ But the heir of the granter representing him will be bound.⁴ An heiress-apparent disposed lands under the reservation of her life-rent. The disponee used inhibition, posterior to which she [the heiress-apparent in possession] granted a lease of nineteen years. The disponee after her death adjudged in implement, and having been infeft, raised an action of reduction [82] of the lease and a process of removing against the lessee. The inhibition was relied on by the pursuer, but the Court, without seeming to attach weight to the effect of the inhibition, held that the defender, who had derived his right from a person not infeft, was not entitled to compete with a singular successor who was infeft; and they decerned against him in the actions of reduction and removing.⁵

Should the lessor's title be reduced, the lessee's right will fall.⁶ This rule has been recently held as operative. A party, having by his trust-disposition and settlement conveyed his estate to trustees,

¹ Gordon v. Hall, 1757, Mor. 15,178. [Apart from all puzzles as to the meaning of the term "*ipso jure null*," it appears to be the law that a lease granted by a minor without the concurrence of his curators, or of his father as his administrator-in-law, may be set aside at any time either by action or exception. 1 Ersk. 7, 34. Bell's Pr. 2090. Com. i. 134. Manuel v. Manuel, 15 Jan. 1853, 15 D. 284. Thomson v. Pagan, 1781, M. 8985. See also Stevenson v. Adair, 5 July 1872, 10 Macph. 919.]

² Bell's Pr. 1181.

³ Bell's Pr. *ut sup.* Menzies' Lectures on Conveyancing, 825. 1 Bell's Ill. 174-5. Lowdon v. Murray, 1759, Mor. 5270. [Weir v. Dunlop & Co., 17 July 1861, 23 D. 1393.]

⁴ Bell's Pr. *ut sup.*

⁵ Gordon v. Milne, 1780, Mor. 10,309, 7008. [The more correct ratio seems to be that the disponee did not represent the lessor. See Bell's Pr. 1181. Weir, *cit.*]

⁶ Bell's Pr. 1182.

they let a part of his heritable property on a lease for ten years. There was a reservation that if the trust-deed should be reduced *ex capite lecti*, the lease should be at an end in so far as it was obligatory on the trustees. By the predecease of a nearer heir of the truster, one of the trustees afterwards became the truster's nearest heir, and he reduced the trust-deed *ex capite lecti*. It was held that he was entitled immediately to remove the trustees from possession, and that he was not barred *personali exceptione* from insisting in an action of removing against the tenant by reason of the reservation in the lease.¹ The case was deemed to come within the rule that "should the lessor's title be reduced, the lessee's right will fall."

Art. 2.—
Apparent
Heir.

When the lessor (who dies uninfest) has himself acquired the property without completing his title, his heir must represent and be liable, as he can acquire only through the lessor. An apparent heir cannot grant a lease which will be secure to the lessee. The lease will not be valid under the Statute 1695, c. 24, against an adjudger, although the granter shall have been three years in possession.² It was said, *obiter*, that a lease granted by an apparent heir, although in possession for three years, would not be valid even against a subsequent heir, as it was deemed that the statute included *debita* only.³ But in a subsequent case, while it was decided that such a lease was not good against creditors and that with respect to them the heir could do no deed to affect the estate, it was admitted that against the next heir passing by the lease would be good upon the Act 1695.⁴ On the same principle a lease for 1260 years, granted by an apparent heir, was sustained against the next heir, although, during the granter's apparenacy his father had a right to the courtesy.⁵ And the doctrine that the Statute 1695 applies to leases as onerous transactions was afterwards held to be undoubted law.⁶

¹ M'Niven v. Murray, 25 May 1847; 9 D. 1138, 19 Jurist 482.

² Bell's Pr. 1181. Lowdon v. Murray, *ut sup.* 1 Bell's Illus. *ut sup.* More's Notes, cccxxiv.

³ Bell's Pr. and Lowdon v. Murray, *ut sup.*

⁴ More's Notes, *ut sup.* Tenants of Killilung, 1760, 5 B. Sup. 877.

⁵ Bell's Pr. *ut sup.* Knox v. Irvine, 1759, Mor. 5276; 1760, 2577.

⁶ Keay v. Marquis, 1804, Hume 434. But see Gordon v. Milne, *ut sup.*

CHAPTER II.

INDIVIDUAL PROPRIETOR.

SECTION I.—LIMITATION BY ENTAIL.

The Statute 1685, c. 22, confers upon proprietors the right of executing entails barring the heirs from alienating or disposing, or doing any other deed by which the property may be evicted or the succession frustrated. The insertion of clauses for these purposes in the subsequent investitures, and of the deed itself in a specified record, is indispensable for rendering it valid against third parties. Entails thus constituted produce important effects upon the power of leasing.

A general prohibition to *alienate*, or a *restriction* upon the power of *leasing*, is commonly controlled by a clause permitting, on certain conditions, leases exceeding the period of ordinary duration.¹ But although there be no such clause, yet if the entail contain no clauses or terms which either expressly bar leases beyond the common period, or, by legal construction, import a prohibition to alienate, leases of any duration can be validly granted. An heir of entail in possession is a proprietor, enjoying every power of which the deed does not divest him; and consequently, when not barred by [84] the entail, a lease by him, however long, if of definite duration and followed by possession, is, in terms of the Statute 1449, c. 17, a real right, effectual against succeeding heirs, as a lease by a proprietor in fee-simple is valid against creditors or purchasers.²

When there is a clause permitting leases in certain specified terms, but without limitation of duration, leases of the greatest length, if granted in terms of that clause, will be good, notwithstanding a prohibition to alienate. A lease for 999 years, with a *grassum*, granted under such an entail, was sustained, although it was argued that the permissive clause had reference exclusively to leases limited to those periods which in law did not amount to alienation.³ Nor was the heir in possession obliged to invest for the behoof of the heirs in succession the bond granted for the *grassum*, which was held to be a benefit in which, by the tenor of

¹ 1 Bell's Com. 70. Bell's Pr. 1733.

² Bell's Com. 68-9. Sandford on Entails, 2d edition, 304-5.

³ 1 Bell's Com. 68. Sandf. on Ent. 305-6. E. Elgin v. Wellwood, 1821, 1 S. App. 44.

the permissive clause, they had no right to participate.¹ Where the deed bore only one restriction of the power of granting leases, viz., that it should not be lawful for the heir in possession "to grant tacks or rentals of the same for any longer space than the grantor's lifetime, at least not to set any tacks or rentals thereof in diminution of the rental, directly or indirectly, longer than the said space," a lease for nineteen years was granted for a rent which was not alleged to be less than that which had been formerly paid. The Court were of opinion that the entire prohibition was contained in the words "at least" of the clause, and that the heir was not therefore restrained from granting any lease, unless it were in diminution of the rental.² Where it was deemed that there was no prohibition to alienate, leases for seventy-seven and three hundred and sixty years were sustained.³ Although these decisions were reversed upon appeal, the reversals proceeded upon the phraseology of the deeds of entail, which was held to import a prohibition against alienating, and therefore against granting long leases.⁴ In consequence, had the phraseology not so imported, the leases would have been accounted good.⁵

And falling
under the
irritant
clause.

Nor will long leases be bad, unless by the combined operation of the prohibitory and irritant clauses; for, notwithstanding the terms of the former, the leases will be valid if the terms of the latter do not apply to leases.⁶ [But where a special prohibition against leases for a longer term than nineteen years was not guarded by a resolute clause [85] applicable to it, it was held, nevertheless, that alienative leases were effectually prohibited, there being an unqualified prohibition against the alienation sufficiently fenced by irritant and resolute clauses.⁷]

Art. 8.—
Leases
under the
the Statute
10 Geo. III.
c. 51.

Although many entails either confer or do not bar the power of granting leases of more than the ordinary duration, there exist many which impose strict restraints. Those limitations having been deemed injurious to the public interest by their detrimental effect upon agricultural improvements, a statute, the 10 Geo. III. c. 51, was passed, conferring extensive powers.

By it (sec. 1) the heir in possession may grant leases of a

¹ Wellwood v. Moncrieff, 12 Nov. 1823, F. C. 335, 2 S. 476.

² Keay v. Marquis, 1804, Hume 434.

³ Elliot v. Pott, 10 March 1814, F. C. 588. Hamilton v. Macdowal, 3 March 1815, F. C. 302. Stirling v. Dunn, 22 Dec. 1827, F. C. 349, 3 D. and A. 417.

⁴ Elliot v. Pott, 1821, 1 S. App. 16, 89. Stirling v. Dunn, *ut sup.*

⁵ Sandf. on Ent. 305-6.

⁶ Dick v. Drysdale, 14 Jan. 1812, F. C. 460. Sandf. on Ent. 130-1.

⁷ Anstruther v. Anstruther, 1840, 3 D. 142, 13 Jurist 43; aff. 1842, 2 Bell's App. 242. [See also Bontine v. Bontine, 24 March 1864, 2 Macph. 918.]

duration of thirty-one years, or for fourteen years, or for two existing lives; but (sec. 2) in leases for two lives, the tenant must be bound to inclose one-third of the lands in ten, two-thirds in twenty, and the whole in thirty years. In leases for any number of years exceeding nineteen (sec. 2) there must be an obligation upon the tenant to inclose one-third of the lands before the expiration of one-third of that period, two-thirds before the expiration of two-thirds of that period, and the whole before the expiration of the lease. No one inclosed arable field shall exceed forty Scotch acres (sec. 3), and all the fences shall be kept and left in good repair.

Powers
under the
Moun-
tgomery
Act. Im-
proving
leases.

By the fourth section there is conferred the power of granting, for the purposes of building, leases for any number of years not exceeding ninety-nine, but under provision (sec. 5), *first*, that no lease of more than five acres shall be granted to one person; *second*, that it shall contain a condition that it shall be voidable, if one dwelling-house at least, not under the value of £10, be not built on each half acre within ten years from the date of the lease; and, *third*, that the houses built shall be kept in proper habitable repair.

Building
leases.

The seventh section declares that the rent in the new lease shall not be under that in the former, and without any grassum, foregift, or benefit whatsoever, directly or indirectly taken by the grantor, who shall not grant the new lease until after the former be determined, or be within one year of its determination.¹

Rent:
Grassum
prohibited.

Although the ordinary style of a lease under this statute does not [86] refer to the statute,² it is advisable, in order to save all danger of question, that there should be an express reference.

This statute has been strictly interpreted.³ Although the cases in which the rule of interpretation has been tried emerged under those provisions which relate to the right of the heir in possession to burden the estate with the expense of meliorations, yet they are in point, because, having been decided upon the rule of strict interpretation being applicable *ex natura statuti*, they rest upon a principle applicable to all the provisions.

Construc-
tion.

In applying the provisions of the statute to leases, it has been decided that, *first*, a lease granted for the consideration of paying

¹ 2 Rose's Lect. 503. 1 Jurid. Styles, 3d edit. 676. 1 Hell's Com. 70-1. Sandf. on Ent. 335-8. Trustees of Elliot v. Elliot, 23 June 1793, Mor. 15,622, F. C. No. 16, p. 32. Finlayson v. Monro, 13 Dec. 1831, F. C. No. 144, p. 493, 1 S. 206. Campbell v. Douglas, 15 May 1822, F. C. No. 175, p. 594.

Crawford v. Torrance (reversing judgment of Court of Session), 26 May 1826, 2 W. and S. 429. Sandf. on Ent. 337.

² Jurid. Styl. 2d edit. 667-8.

³ Thomson v. Mowat, 1824, 3 S. 385.

the lessor's debts, or for a similar consideration, was invalid, because the strong and comprehensive terms of the seventh section include every benefit different from rent received by the lessor, and such any undertaking by the lessee must be deemed.¹ *Second*, an improving lease, the duration of which was left to the option of the lessee, and which duration he, by raising a declarator, elected to be for thirty-one years, was sustained as an ordinary act of administration, against a plea by an heritable creditor of the lessor that the transaction was at variance with the entail and the statute.² *Third*, the *bona fides* of the statutory lessee, absence of specification in an award of the quantum of *grassum* corresponding to the portion of ground let, and the application of the brocard *de minimis*, although the *quantum* had been ascertained, formed the *rationes* for which a *grassum* forming an ingredient in fixing the last rent, but not mentioned in the last lease, and unknown to the lessee of the new building-lease, was not taken *in computo* in determining whether the rent of the building-lease was or was not below the last rent; and the lease was sustained in an action by the succeeding heir proceeding on the ground of *grassum* and diminution of rent.³

[*Fourth*, A lease was granted under the Montgomery Act for 99 years, with all the usual and requisite conditions, and declaring that it was granted and accepted for the purpose of erecting a powder magazine on the ground let, the lessee being bound to erect such a magazine, of the value of £1000, within a year, and to maintain buildings of such value under pain of nullity. The proprietor gave the lessee a back-letter stating that it was not his intention to enforce the clause requiring the erection of dwelling-houses in addition to the magazine. Such dwelling-houses were not erected, and on the death of the lessor, fourteen years after the date of the lease, the next heir raised a reduction of the lease as in contravention of the entail. It was held (Lord Curriehill dissenting) (1) that, as the statute was an enabling statute, the failure to comply with its conditions inferred the nullity of the lease *ab initio*, and not merely an irritancy which might be purged; and (2) that it was not valid even for twenty-five years, the period for which leases were permitted under the entail, in respect that it was not a lease of ordinary administration, to which the permissive clause applied. It was also observed by Lord Deas, that to sustain the lease for twenty-five years would be in the circumstances to make a new contract for the parties.⁴]

¹ *Mure v. Mure*, 22 Dec. 1806, F. C. 64.

² *L. Elibank v. Pentland*, 1821, 1 S. 117.

³ *D. Buccleuch v. Ewart*, 24 Nov. 1827, F. C. 112, 6 S. 128.

⁴ *Miller v. Carrick*, 29 March 1867, 5 Macph. 715; aff. 15 June 1868, 6 Macph. H. L. 101.]

Two questions have been raised—*First*, Whether, under an entail prohibiting leases for a longer period than nine years, a lease for nineteen years, but not stipulating for improvements, is protected? Other matter conclusively subversive of the lease having been established, the question was not determined.¹ *Second*, Where an entail prohibited leases of longer duration than nineteen years, and also prohibited diminution of rent and acceptance of grassums, and obliged the heir in possession to obtain reasonable rents, so that his successor could not be injured by his leasing at an undervalue, or taking as grassum what ought to be paid annually [87] out of the fruits, it was pleaded that transactions by which the heir in possession took renunciations and let again for the same or for an increased rent, were protected by the statute, because there was no diminution of rent, no grassum, or other benefit besides the rent. The case was decided and the lease sustained, not upon powers under the statute, but upon its consistency with the powers under the entail.²

Without either a permissive clause, or recourse to the powers conferred by the Statute 10 Geo. III. c. 51, or to those given by the statutes of William IV. and Victoria, to be detailed under the next section, an heir in possession, under an entail properly constituted, can grant only leases of such a duration, and with such other stipulations, as are practically indispensable for enabling him to reap the full profits. All leases are, in strictness, alienations; but, in legal construction, there is deemed to exist, notwithstanding the prohibitions, a power equivalent to a permissive clause, warranting such leases as are necessary for good administration and not injurious to succeeding heirs.³ A material extension of power has been given by the statutes of William and Victoria. But it is necessary to detail the former rules of law, both as shewing the inductive cause of those statutes, and also as embodying doctrine which may be held to govern cases for which those statutes do not provide.

Art. 6.—
Powers
limited to
granting
leases com-
patible with
good admin-
istration.

¹ *Mure v. Mure*, *ut sup.* The question stated does not appear from the Report, but from the Session Papers and Sandf. on Ent. 336.

² *M. of Queensberry v. Exrs. of D. of Queensberry*, 15 Nov. 1815, F. C. 1; aff. 1820, 6 Pat. 551.

³ 1 Bell's Com. 69. 3 Ersk. viii. 29, Notes. 2 Stair iii. 56, Note (by Brodie) vol. ii. 271-2. More's Notes, clxxv. Sandf. on Ent. 200-1. *E. Wemyss v. D. of Queensberry and Welsh*, 1819, 8

Dow 293. *Hyslop and Exrs. of D. of Queensberry v. D. of Buccleuch*, 1817, 5 Dow 293. *Id.* 12 July 1819, 1 Bligh 339. [*Bontine v. Bontine*, 24 March 1864, 3 Macph. 918.] The principle having pervaded all the cases of the Queensberry leases relative to duration and stipulations, was fixed by those decisions of the House of Lords, which, as ruling several matters, are cited hereafter.

Cases under
Mont-
gomery
Act.

1st, In the exercise of the permissive power, even previously to the extending statutes, an agricultural lease for nineteen years might have been granted, which, it has been said, was alone to be relied upon.¹ On one occasion a lease for twenty-one years was supposed to be effectual.² And as a lease of that duration does not imply the power to sublet inherent in long leases,³ there might [88] have been reason to deem it within the limitation. While such was the rule applicable to leases of the ordinary nature, an opinion has been indicated that leases of much longer duration might have been sustained on the principle of administration, where they were necessary for important agricultural improvements.⁴ The doctrine has been indicated that leases of increased duration would be valid where such a duration was proved to be necessary for preventing the subject-matter from being placed *extra commercium*.⁵ This doctrine has been recognised; for while there is no decision, there are concessions and *dicta*, which, although *obiter*, appear to be sound, and have not been questioned. In one case, the rule, it was held, would apply to minerals,⁶ and in another to water.⁷

Lease of
entailed
urban sub-
jects.

2d, A burgage or urban tenement may validly be entailed, as the Act 1685 is general, including houses in burghs as well as lands, and their ordinary appendages;⁸ and it has been said that entails of houses in burghs were at one time not uncommon.⁹ At present it is believed that such entails are of rare occurrence; but under such an entail both the statutory rules (in so far as applicable) and the rules of common law would govern, as under the entail of an agricultural or mineral subject. It may well be deemed that, on the principle of administration, a lease of long duration might be sanctioned where it was necessary for rendering the value of the subject truly efficient. Examples of this, in the case of large manufactories, are easily supposable.

3d, In the stipulations other than those affecting duration, the rule of compatability with good administration must govern. The rent must be conformable to the ordinary market rate, combined with due allowance for liberal dealing. Neither grassums nor other encroachments on the future revenue are permissible, for reasons which shall be immediately developed.

¹ 1 Bell's Com. 69. Ersk. Note, *ut sup.*

² Bell's Com. and Ersk. *ut sup.* E. of Wemyss v. D. of Queensberry's Ex. and Murray, 12 June 1822, F. C. 634, 1 S. 483.

³ E. of Cassilis v. M'Adam, 1806, Mor. Tack, App. 14.

⁴ Sandf. on Ent. 302.

⁵ More's Notes, clxxv.

⁶ Per Lord Pr. Hope in E. of Wemyss, *ut sup.*; vide Session Papers. Sandf. on Ent. 301-2.

⁷ Stirling v. Dunn, 23 Dec. 1827, F. C. 349, 6 S. 273, 3 D. and A. 417.

⁸ M'Lauchlan v. M'Lauchlan, 1768, Mor. 15,422.

⁹ M'Lauchlan v. M'Lauchlan, *ut sup.*

The doubt which was entertained relative to the validity of agricultural leases of the duration of even twenty-one years, and of those long leases of minerals which were deemed to be advisable, induced the Legislature to make provision on the subject, and accordingly the Statutes 6 and 7 Will. IV. c. 42 (28th July 1836), [89] 1 and 2 Vict. c. 70 (4th August 1836), 11 and 12 Vict. c. 36 (14th August 1848), and 16 and 17 Vict. c. 94 (20th August 1853), were passed.

The preamble of the former Act¹ bears that it is expedient that certain powers should be conferred on heirs of entail in relation to granting tacks. By section first it is enacted, that notwithstanding any prohibitory, irritant, or resolute clauses, contained in any entails already made and established, pursuant to the directions of the Act 1685, it shall be lawful for the respective heirs of entail in possession to grant tacks of any part of the lands, estates, or heritages, for the fair rent at the period of letting, either by public auction or private bargain, and notwithstanding any prohibition against diminution of the rental, for any period not exceeding twenty-one years, and to grant tacks of any mines or minerals for any period not exceeding thirty-one years. But there are express prohibitions under the sanction of nullity, *first*, against taking any grassum or valuable consideration, and, *second*, against granting leases of the mansion-house and park and their appurtenances for any period longer than the life of the granter. By section second it is enacted, that nothing contained in the statute shall prevent an heir of entail in possession from exercising any power of granting tacks, which may be contained in the entail, more extensive than the power conferred by the statute. By section twentieth it is enacted, that all the permissions or prohibitions applicable to heirs of entail shall also be applicable to a trustee under obligation to execute an entail, and that under the term "heir of entail," the institute equally with any substitute shall be included.²

The enactments of this statute apply only to entails recorded in terms of the Statute 1685, but it was held advisable so to extend the enactment as to include entails not so recorded. For (as will appear under the next article), although an unrecorded entail would not have warranted the reduction of a lease longer than the permitted period, or an action of damages against the representatives of the contravener, yet it would have warranted an action of declarator by the heirs of entail for the purpose of forfeiting the contravener's right to the estate. In consequence, the Act of 1 and 2

¹ 6 and Will. IV. c. 42.

² Duff on Entails, pp. 60-1. 2 Bell's Com. (8th edit. Shaw's) 831-2.

Art. 5.—
Leases
under the
Statutes 6
and 7 Will.
IV. c. 42; 1
and 2 Vict.
c. 70; 11
and 12 Vict.
c. 36; and
16 and 17
Vict. c. 94.

Rosebery
Act.

1 & 2 Vict.
c. 70, as to
unrecorded
entails

Vict. c. 70, was passed, extending to heirs of entail in possession under deeds of entail not recorded in terms of the Act 1685, all the powers, conditions and clauses contained [90] in the statute of William in relation to the granting of tacks, and declaring that they shall be as valid and effectual as if they had been recited in that statute.

Entail
Amendment
Act, or
Rutherford
Act.

By the 11 and 12 Vict. c. 36, sec. 24, it is enacted, that notwithstanding any of the ordinary restraining clauses, or any limitation as to *maximum* or *minimum* of extent of ground, the heir in possession under any entail dated prior to the 1st of August 1848 may, on notice to the next heir of entail, with the approbation of the Court of Session according to a form prescribed, grant long leases of any part of the entailed estate for the highest rent which can be got, such leases not exceeding in all one-eighth part in value for the time of such estate, under *proviso* that it shall not be lawful for the heir to take any *grassum* or fine or valuable consideration other than the tack-duty or rent, nor to grant any lease of the mansion-house, offices, or policy, and the heir shall be entitled to make, at the sight of the Court, all such tacks or leases as shall be necessary. If any *grassum*, fine, or consideration be taken, and any lease prohibited by the statute be granted, such lease shall be null and void, but the heir of entail in possession is not prevented from exercising any power of granting leases which may be contained in the tailzie, under which he possesses more extensive powers of granting leases than the statute confers.¹

Procedure.

The 34th, 35th, and 36th sections regulate the procedure before the Court. The application (s. 33) for the authority of the Court is by summary petition, which must contain a detail of the heirs-substitute and whether those of age consent, and, if not of age, details as to their guardians, who by the 31st section are entitled to consent for them. The 34th section enacts intimation of the petition for at least six weeks in newspapers appointed by the Court, and it shall be sufficient that the leading name of the land is set forth. By the 35th section it is enacted, that after intimation and advertisement, if the procedure shall appear to the Court to be regular and proper, the Court shall authorise the applicant to do the act proposed, provided it shall be competent at any time before the decree be extracted for any one having interest to object to the prayer of the petition. And in the event of such an objection, the Court shall dispose of it by such formal procedure as they may deem proper.² The 36th section enacts that it shall be necessary

¹ Duff on Entails, pp. 61-2.

² *Vide* Duncan on Summary Entail Procedure, *passim*.

to call as parties those heirs of entail whose consent may be required on an application to disentail.¹

[91] By 16 and 17 Vict. cap. 94, s. 6, it is enacted, that on the application of an heir of entail entitled in terms of the 11 and 12 Vict. cap. 36, 'to apply for authority' and approbation of the Court to grant long leases to an extent not exceeding in all one-eighth part in value at the time of the entailed estate, it shall be lawful for the Court, 1st, To fix and determine the *minimum* tack-duty at which the lands specified, or the different portions of them, where there are different values, may be let on long leases. 2d, And such rate of tack-duty having been fixed, shall be acted upon with reference to all long leases which may be granted from time to time, unless, 3d, The Court, on motion by a party having interest, shall alter, which they are empowered to do from time to time; in which case the altered tack-duty shall be substituted for the tack-duty previously established. 4th, It shall be lawful for the Court to approve of a form of long lease to be made use of, and to grant authority to the heir of entail to execute leases in the approved form, subject to any conditions or stipulations which the Court may deem necessary. 5th, The form may be altered by the Court from time to time, as they may see fit; and, 6th, *Grassums* and leases of the mansion-house, offices, or policies (or leases prohibited by the statute), are declared to be null and void.

16 and 17
Vict. c. 94,
§ 6, as to
long leases.

The Courts in construing these statutes have proceeded upon the principle, that a species of improvement which assumes that, while the entailed estate is to be benefited, the benefit is to be made at the expense of the future heirs of entail, is not contemplated by the statute. Application was made to the Court under the statutes to authorise a portion of trust-funds which were directed by the truster to be invested in the purchase of property to be entailed (but which had not yet been so invested), to be used in building houses for work-people on property previously bought. Such houses, it was stated, were much needed. But the Court, conformably to the principle now stated, refused to grant the authority.²

Cons
racion.

A strict interpretation has been given to the Statute of 16 and 17 Vict. c. 94, ss. 1 and 3. A petition under that statute for authority to grant long leases misdescribed the maker of the en-

¹ As the details relative to disentailing form properly a branch of the law of entail, the author does not deem it necessary or advisable to insert them,

and accordingly as to them he makes reference to the statute itself.

² Dunlop, 19 June 1855, 17 D. 966 27 Jur. 487.

tual, because no words are prescribed by the statute of entails.¹ But the terms hitherto judicially settled are, 1st, "alienate;" 2d, "dispono;" 3d, "put away," or "dilapidate;" and, 4th, "to let without diminution of the rental," or "below the just avail."

Alienation.

1. "ALIENATE."—A series of authorities proves that, under the term "alienation," leases of extraordinary duration have always been included,² [or rather the doctrine is that "all leases are *sua natura* alienations, but that if they are of limited endurance they are to be regarded as proper acts of administration on an entailed estate, and on that ground to be protected"].³ The practice of granting long leases is said to [98] have arisen about the end of the seventeenth century, in order to improve estates, and to secure a good permanent rent to succeeding heirs. During more than three-fourths of the succeeding century the same ideas prevailed; and to these leases the improved state of agriculture is said to have been mainly attributable. But as skill and capital increased, long leases were deemed unnecessary, and falling into disrepute, were not granted except to bestow a favour or to obtain some benefit specially covenanted; and the change of general opinion created doubts of the powers of heirs in possession to grant leases of extraordinary duration.⁴

Although, about the middle of last century, doubts were manifested relative to the powers of heirs in possession to grant leases of unusual duration, which seemed to approach nearly to alienations,⁵ it was not until 1761 that any action of reduction was instituted. A suit was brought to reduce two leases of extraordinary duration, principally on the ground that as the granter "was an heir of entail, it was not in his power to grant leases for such a term of years as thereby to deprive the succeeding heirs of the management of their estate." The leases having been sustained on the express *ratio* that the entail was not recorded, the inference is warrantable that otherwise they would have been reduced.⁶ It may be inferred from a subsequent case that a lease longer than

¹ 3 Ersk. ii. 20, Note 427. Elliot v. Pott, 1821, 1 S. App. 94.

² Mackenzie's Obs. on Stat. 1455, c. 41, p. 45. Balfour 203, c. xvii. 2 Craig, x. 5, and 3 Craig, iv. 5. 2 Stair, xi. 13. 3 Mackenzie's Obs. on 1621, c. 18, p. 8. 2 Bank ix. 46. Bogle v. Bogle, 1758, Mor. 3235. Chrystianson v. Ker, 1733, Mor. 3226. 1 Bell's Com. 69. 2 Bell's Com. (6th edit. Shaw's), 874. 3 Ersk. viii. Note 246. Note (by Brodie) to 2 Stair, iii. 59, vol. i. pp. 271-2. Sandf. on Ent. 294. Bell's Pr. 1752. More's

Notes clxxv. Duff on Feudal Conveyancing, 362-3.

³ [Per Lord Curriehill in Bontine v. Bontine, 24 Mar. 1864, 2 Macph. 918.]

⁴ Per Lord Balgray, from personal and practical knowledge in Innes v. D. of Gordon, 21 Dec. 1827, F.C. pp. 318-19, 6 S. 312-13.

⁵ Per Lord Elchies in Cra. of Jordanhill v. E. of Crawford, 1752; 2 Elchies, 446, Tack 18; 5 B. S. 797. Kames' Eluc. 358.

⁶ L. Kinnaird v. Hunter, 1761 Mor. 15,611; [aff. 1765, 2 Pat. 97].

the entail permitted was deemed valid; but the precedent is feeble, for on appeal the judgment affirming proceeded upon the principle that the lease was good because the entail had not been put upon record.¹

In the noted case,² which for a time was thought to have settled the validity of long leases, there was much special matter, particularly the existence of a subsequent deed, by which the entailer removed all restrictions upon the power of granting leases, and authorised leasing upon any terms.³ In consequence, that case was held to [99] be special; and, notwithstanding, the doctrine that long leases were "alienations" was definitively established.⁴

2. "DISPONE."—After much diversity of opinion, it has been settled that the term "dispone" is equipollent with "alienate," and therefore prohibitory of leases of unusual duration. The terms "dispone" and "disposition," as numerous authorities shew, are generic, and of a signification more comprehensive than "alienate" and "alienation."⁵ Notwithstanding, it was decided that a prohibition to disporre did not bar long leases; *first*, Because no prohibition could be created by inference or implication; and, *second*, Because there was no authority for saying that the word "disporre" was equivalent to alienate.⁶ A different opinion having been entertained by the House of Lords, the matter was remitted for the consideration of the whole Court.⁷ Although a majority of the whole of the Judges held the equipollency of the terms, a majority of the Division of the Court (Second Division), before which the

¹ *Carre v. Cairns*, 1774, Mor. 15,523, 1 Hailes 551; aff. 1774, 2 Pat. 343.

² *Lealie v. Orme*, 1779, Mor. 15,530, 2 Hailes 832; aff. 1780, 2 Pat. 533.

³ 1 Bell's Com. 69, Note. Sandf. on Ent. 296. Bell's Prin. More's Notes, and Duff on Feud. Conv. *ut sup.* D. of Queensberry v. E. of Wemyss, 1807, Mor. Tailzie, App. 15. Id. 10 and 17 Dec. 1813, 3 Dow, 112-19, 122-3, and 214; 5 Pat. 758. D. of Queensberry's Exrs. v. D. of Buccleuch, 1819, 1 Bligh, 339, 510; 6 Pat. 465, 548, 551. Innes v. D. of Gordon, 21 Dec. 1827, F.C. pp. 284-6, 6 S. 296-7.

⁴ D. of Queensberry v. E. of Wemyss, *ut sup.*

⁵ Dig. l. xxxviii. t. v. l. 7 (De optione vel electione legata); Hein. ad Pand. l. vi. t. l. a. 78 (De rei vind); Voet, ii. p. 624, a. 52, and p. 625, a. 52. Reg. Maj. c. 20, 23, 29. Baillie's Eng. Dic. *ad verb.* Disponee. Jameson's Scott. Dic. *ad verb.* Anallie. Balfour 156, 161, 163, 165, 171, 200, 203, 207. 2 Craig, iii. 23, 23.

Hope's Maj. Pract. MS. (Adv. Lib.) t. 29, p. 314. 1 Stair, ii. sect. 3; t. iii. sect. 14; t. v. sect. 1, 3, 6; t. vii. sect. 1; t. ix. sect. 1, 2; b. iii. t. ii. sect. 1, 3; b. iv. t. xvii. sect. 4. Dirleton, 145-6, 253. Dallas, Spottiswoode, 366. 2 Mackenzie 487. 2 Bankt. iii. 141. 2 Ersk. v. 10. 2 Blackstone 317. Inventory of the Royal Wardrobe and Jewel House, Edin. 1815, pp. 183, 197, 283. Stat. 1474, c. 50; 1571, c. 39; 1581, c. 101; 1585, c. 11, 17; 1587, c. 68, 69; 1597, c. 233-240; 1606, c. 12. Kilk. 188, 541-2. Gordon Cumming v. Gordon, 1761, Mor. 15,513. Bruce v. Bruce, 1799, Mor. 15,539. Elliot v. Elliot, 1803, Mor. 15,542.

⁶ 1 Bell's Com. 70. Sandf. on Ent. 297. Elliot v. Pott, 10 March 1814, F. C. 588. Hamilton v. M'Dowal, 3 March 1815, F. C. 302. D. of Queensberry's Exrs. v. D. of Buccleuch, 7 March 1816, F. C. 105.

⁷ Id. 10 July 1817, 5 Dow 293.

case depended, adhered to their judgment. On appeal the equipollency was established.¹

'Put
away."
"Dilapi-
date."

3. "PUT AWAY," translated by "*Dilapidare*."—The term "put away" is proved to have the same purport with the term "alienate;" *first*, by the opinions of the most distinguished scholars;² *second*, [100] By the usage of ancient legal authorities;³ *third*, By the use of "put away" in place of "alienate" in deeds of entail, and by the opinion of the Court upon them;⁴ and, *fourth*, By the use of these words by conveyancers as indicating that they are understood to be of the most comprehensive nature. Where, in investitures following upon the deed of entail, the term "*dilapidare*" is used, it is held to be the translation of the terms "put away," and therefore to be equally forcible.⁵ It was subsequently ruled that these terms were effectual to prohibit leases of extraordinary duration.⁶

Diminution
of rental.

4. "Without diminution of the rental," or "below the just rent or avail for the time." In the *rationes* of most of the decisions reducing as alienations leases of unusual duration, there has been in part combined injury to the succeeding heirs by anticipation of the future revenue of the estate, by means of grassums, varying rents excessive at first and inconsiderable afterwards, a bonus, or similar devices. Although the lease do not exceed the ordinary period, such an anticipation would subvert it if there be a prohibition to let with diminution of the rental or rent, which terms are synonymous. The principle is, that the heir in possession cannot lawfully reap a greater benefit himself than he leaves to be reaped by his successors.⁷

¹ Id. 5 Feb 1818, F. C. 466; rev. 1819, 1 Bligh 339, 6 Pat. 465, 548, 551. 1 Bell's Com. 70. Sandf. on Ent. 297-9. 3 Ersk. viii. 29, Note, 426. 2 Stair, iii. 59, Note (by Brodie), p. 272. 1 Bell on Leases, 128, Note (b). Elliot v. Pott, *ut supra*, rev. 1821. 1 S. App. 16, 89. Stirling v. Walker, 21 Feb. 1821, F. C. 279. Hamilton v. M'Dowal, *ut supra*, rev. under name of Stirling v. Dunn, 1829, 3 W. and S. 462.

² Eliotæ Bibliotheca, Lond. 1542, v. Alienare. Cooper's Thesaurus Lingue Romanæ et Britannicæ, 1678. Dr Holyoke's Dic. 1667. Ainsworth's Dic. Young's Dic.

³ Balfour, 163, 166, 203, 206. 3 Craig, iii. 24. Hope's Min. Prac. t. xvi. s. 9. 3 Mackenzie, Inst. viii. 16. 3 Ersk. viii. 97. Stat. 1455, c. 41; 1493, c. 60; 1587, c. 119. Chrystisons v. Ker, and Bogle v. Bogle, *supra*.

⁴ Cra. of Carleton v. Gordon, 1753, Mor. 10,258. Cra. of Jordanhill v. E. Crawford, 1752. Elch. Tack, 18. Gordon Cumming v. Gordon, Mor. 16,513.

⁵ Sees. Pap. in Mordaunt v. Innes, *infra*. Stephani Thesaurus. Calvini Lexicon. Dig. l. v. t. iii. l. 25, s. 11; l. xxvi. t. iv. l. 1, s. 1. Loci Communes in Jus Canonicum. Abridg. of Acts of Assem. vocs Ministers, s. 10. 1 Craig, xii. 31. 4 Stair, i. 4, 23. Mackenzie Inst. b. ii. t. xi. sect. 2; b. iii. t. viii. sect. 16. Hope's Min. Prac. t. xvi. sect. 9. Steuart's Ans. to Dirlerton, 72. 2 Dallas, 277. 1 Ross' Lect. 475. 3 Bell's Forms of Deeds, p. 392; Id. 6, pp. 75, 557.

⁶ Sandf. on Ent. 269. Mordaunt v. Innes, 9 March 1819, F. C. 679; aff. 1821, 1 S. App. 169.

⁷ 1 Bell's Com. 73. Sandf. on Ent. 305-26. 3 Ersk. viii. 29, Note, 426. 2 Stair iii.; Note (by Brodie), vol. i. p.

These prohibitions have been practically applied to the details of the modes of leasing. Art. 10—
Practical
effect of the
prohibitory
phraseology

[101] *1st*, A lease of the proprietorship, or grant of almost every right available to the owner of an entailed estate, will be deemed illegal.

A lease had been made, granting to the tenant, his heirs, successors, assignees, and subtenants, for seventy-six years, and the life of the lessee in possession, and for a progressive but very inadequate rent, *first*, The whole of the lessor's lands situated within a particular county, all of which lands were under current leases, with the power of apportioning, for the future, the size of the farms; *second*, A right to markets, customs, and all the other manorial appurtenances; *third*, A right to work the minerals for sale, as well as for the use of the estate, during the lessor's lifetime, and afterwards only for the latter purpose; *fourth*, A right to cut the plantations for sale; *fifth*, A right to the mansion-house, with the power of rebuilding it, and burdening the estate with the expense; *sixth*, Full power over the game; *seventh*, A commission from the proprietor vesting the tenant with the right of presentation to the parish during the lessor's lifetime, and of acting for him in all local matters. Every right pertaining to proprietorship was thus conveyed except that of voting as a freeholder.¹ Lease of
whole
estate.

Although the extraordinary duration, especially when combined with the inadequacy of the rent, would have been sufficient to invalidate this lease, the transaction would, independently, have been deemed unwarrantable, because it was *in fraudem* of the heir in succession, excluding him from all the rights and benefits attendant upon property, and which, in contemplation of the entail, were to devolve to him. In reducing the lease much reliance was placed upon the very extensive and unwonted nature of the powers conveyed by it; and, in a subsequent case, relative to reimbursement for meliorations under it, opinions to the same purport were expressed.²

But where an entail reserved power to the heir in possession to grant leases for nineteen years, there was sustained, notwithstanding the plea that the leasing power included vacant farms only, an Lease of
rents.

272. Duff on Fend. Conv. *ut sup.* D. Buccleuch v. D. Queensberry's Exec., 10 July 1817, 5 Dow, 297; and 12 July 1819, 1 Bligh 339, 534, 6 Pat. 465, 548, and 551. E. Wemyss v. D. Queensberry's Exrs.; and throughout the cases of the Queensberry leases, and other cases decided on the same principle, cited *infra*.

¹ Baronesse Mordaunt v. Innes, 1819 and 1822, *ut sup.*; and Innes v. D. of Gordon, 31 Dec. 1827, F.C. 260, 6 S. 279. [D. of Roxburghe v. Kerr, 17 June 1813, F. C. 374; *aff.* 1813, 2 Dow 149, 5 Pat. 609 and 768.]

² Innes v. D. of Gordon, *cit.*

over-lease at the real value of the *rents* of a barony, many of the tenants of which barony had current leases.¹

Leases of
unusual
duration.

2*d*, Those leases which by reason of unusual duration have been held to amount to alienations are as follows. Those for a thousand years. In one case, in which a lease for that period was reduced as an alienation, the judgment affirming proceeded upon the ground that [102] it was against a prohibition to let in diminution of the "true worth and rental," having been granted for a rent lower than that paid at the expiration of the previous lease; and therefore that it was unnecessary to determine whether it was liable to reduction on any other ground.² But its invalidity, by reason of duration alone, is undoubted, because leases for periods much shorter have, on that ground, been set aside as alienations. A lease of a portion of a loch for three hundred years was held invalid under a prohibition to dispoise.³ A lease for a hundred years, although there is no case in point, has always been justly considered invalid.⁴ Leases for ninety-nine years,⁵ ninety-seven years,⁶ seventy-six years and the lifetime of the tenant in possession at the expiration of that period,⁷ seventy-seven years,⁸ sixty-six years,⁹ fifty-seven years,¹⁰ forty years,¹¹ and thirty-one years, have also been held invalid.¹²

Life-
leases.

There has not been discovered any decision applying the rule to life-leases; but its application to them upon principle appears to be unquestionable. In the Books such leases are either expressly styled alienations,¹³ or are described as vested with the qualities which distinguish leases classed under that denomination. As they import a right more permanent and more nearly approaching to property than do leases of ordinary duration, they, in common with leases of definite but unusual duration, imply, in the absence

¹ *L. Cathcart v. Schaw*, 1755, Mor. 15,403, F. C. 195, 5 B. S. 816; aff. 1756, 1 Pat. 618.

² *Turners v. Turner*, 1807, Mor. Tailzie, App. 16; aff. 1813, 1 Dow 423, 5 Pat. 758.

³ *Stirling v. Dunn*, 22 Dec. 1827, F. C. 340, 6 S. 272, 3 D. and A. 417; aff. 22 June 1829, 3 W. and S. 462.

⁴ 1 Bell's Com. 69. Sandf. on Ent. 294. 2 Stair iii. 69, Note (by Brodie), p. 271. *Kames' Eluc.* 358. — *v. —*, 1752, 5 B. S. 797.

⁵ *Malcolm v. Henderson*, 1807, Mor. Tailzie, App. 17; aff. 1814, 2 Dow 285.

⁶ *D. of Queensberry v. E. Wemyss*, 1807, Mor. Tailzie, App. 15, Buchanan

408; aff. 1813, 2 Dow 90-124, 206-15, 5 Pat. 758.

⁷ *Mordaunt v. Innes*, 9 March 1819, F. C. 679; aff. 1 S. App. 169.

⁸ *Elliot v. Pott*, 10 March 1814, F. C. 588; aff. 1821, 1 S. App. 16, 89.

⁹ *Turner v. Turners*, 6 Dec. 1811, F. C. 363.

¹⁰ *E. Wemyss v. D. of Queensberry and Welsh*, 25 May 1813, F. C. 298; aff. 12 July 1819, 3 Dow 293, 1 Bligh 337, 6 Pat. 465, 551.

¹¹ *Malcolm v. Bardner*, 1823, 2 S. 410.

¹² *Stirling v. Walker*, 20 Feb. 1821, F. C. 279.

¹³ *Balfour*, 203 *Craig*, x. 5. 2 *Ross' Lect.* 484.

of an express prohibition, the power of assigning and subletting,¹ and they fall under the liferent or double escheat.²

Whether a lease granted for a prohibited period shall be totally [103] invalid, or shall be valid for the period authorised by the entail, or, in the absence of specification, for the period recognised *ex lege* as competent, is a question which has not been determined.³ It was raised in three cases, but, in none being pure, in none does the decision form a precedent.

Whether such leases invalid *in toto*, or only *quoad excessum*.

In the first case, it was found that the permissive clause not having barred leases for any definite period which did not amount to alienation, a lease of illegal duration might therefore have been restricted to the period of nineteen years, being the period most usual, and analogous to the statutory period where no improvements are stipulated; but, because the lease was objectionable (besides its excessive duration), upon grounds by reason of which the lessee had no claim in equity in support of the lease, the judgment was, that the lease could not be restricted to any shorter period than that for which it had been originally granted.⁴

In the second case, a reduction *in toto* proceeded upon the *rationes* that the lease being a grant of the proprietorship, not merely its duration, but its nature, must be changed before its validity could, to any extent, be admitted, and, consequently, that the restriction would have been the creation by the Court of a contract different, in kind as well as duration, from that contemplated by the parties.⁵ But the question of admissibility of restriction, if excessive duration had been the only objection, was left open, with opinions given *obiter* upon both sides.

In the *third* case, in which an application to restrict was rejected, the lease was invalid by reason of *grassum*.⁶ Opinions have been given both for⁷ and against⁸ the power of restriction.

On principle, the power may be deemed questionable, because duration being *inter essentialia* of the contract, and very often governing the other stipulations, the Court, by restricting, would create a

¹ 2 Stair, ix. 26, Note vi. (by Brodie).
2 Mackenzie Inst. vi. 7. 2 Bankt. ix. 11, 46. 2 Erak. vi. 32. 2 Ross' Lect. 484. 1 Bell's Com. 77. Tait's Just. of Peace 388. Sandf. on Ent. 303. Hume v. Craw, 1637, Mor. 10,371. Duff v. Fowler, 1672, Mor. 10,282.

² Hope's Min. Frac. t. vii. s. 2, 5, and Note to 5. 2 Stair iv. 62, ix. 24, iii. 15. 2 Mackenzie Inst. v. 25, 26. Mackenzie's Obs. 352. 2 Bankt. iv. 40, ix. 46. 2 Erak. v. 61, 66, 68, 70. Sandf. on Ent. 303. Stat. 1617, c. 15.

³ 1 Bell's Com. 70. 1 Bell on

Leases, 129, Note. 3 Erak. viii. 29, Note 426.

⁴ E. Wemyss v. Murray and Exrs. of D. of Queensberry, 17 Nov. 1815, F. C. 8.

⁵ Mordaunt v. Innes, 9 March 1819, F. C. 679; aff. 1822, 1 S. App. 169; vide 2 S. 32; and Innes v. Duke of Gordon, 21 Dec. 1827, F. C. 160, 6 S. 279.

⁶ Malcolm v. Bardner, *ut sup.*

⁷ 1 Bell's Com. 70.

⁸ Sandf. on Ent. 303. 2 Stair, iii. 59. Note (by Brodie), p. 272.

new contract not in the contemplation of the parties. This view is favoured by the analogy of the rule, that, where a lease is bad by reason of *grassum*, the lessee cannot, after the death of the lessor, purge the irritancy, and so bar reduction by apportioning the *grassum* as anticipated rent over the future years of the lease, for by so permitting the Court would frame a new contract.¹ But the weight [104] of authority,² and the tenor of an analogous decision, appear to be favourable to the power. A lease is valid where, although granted nominally for a longer period, no more than the permitted term is to run after the date of the lease.³ And, under an entail prohibiting leases for more than twenty-seven years, a lease for thirty-one years from a term of entry five years prior to the date of the lease, was sustained;⁴ because, although *ex figura verborum* the lease did exceed the permitted period, the actual duration, and consequently the possession, did not exceed that period.

Lessee cannot purge irritancy.

3d, As already indicated, it has been held that after the death of an heir contravening the prohibition against alienation by granting leases of an unusual duration, the lessee will not be permitted to purge the irritancy.⁵

Renunciation followed by new lease.

4th, An heir of entail may accept of a renunciation of a current lease and then grant a new one.⁶ But if a new lease be granted to commence upon the expiration of the current lease, the new one will be invalid against a succeeding heir, should it not be followed by possession before the succession opens to him. Without possession a lease is not a legal right, and therefore not obligatory upon an heir taking only under the entail. Were such grants admitted, either the essential requisite of possession must be dispensed with, or a new and different contract must be feigned, by holding the deed to have been actually operative from its date.

In an unreported case, the sound rule of holding the lease invalid from defect of power in the granter was adopted. An entail prohibited leases of a duration longer than nineteen years. During the currency of leases of which many years were unexpired, the heir in possession granted new leases, and the lands having

¹ D. of Queensberry's Exrs. and Hyslop v. D. of Buccleuch, 6 July 1820, F. C. 164; aff. 1821, 1 S. App. 59, 64. E. Wemyss v. Exrs. of D. of Queensberry and Murray, 2 Feb. 1821, F. C. 256. [And see opinions in Miller v. Carrick, 29 March 1867, 5 Macph. 715, a case under the Montgomerie Act, cited above.]

² 1 Bell's Com. 70. [See *contra* Bell's Fr. 175, and comp. Forbes v. Wilson, 22 Feb. 1873, 11 Macph. 454, and Miller v. Carrick cit.].

³ 1 Bell's Com. 70. Sandf. on Ent. 303.

⁴ Agnew v. Macniven, 23 June 1813, F. C. 400.

⁵ Duff on Feud. Conv. p. 377. D. of Queensberry's Exrs. and Hyslop v. D. of Buccleuch, and Wemyss v. Exrs. of D. of Queensberry and Murray, *ut sup.*

⁶ Bell's Prin. 1752. More's Notes clxxxvi. M. Queensberry v. Exrs. of D. of Queensberry, 15 Nov. 1815, *ut sup.*

been sold for the payment of the entailor's debts, these leases were reduced by the singular successor.¹

In two subsequent cases the principle was abandoned, and effect given to the fiction of anticipated operation. Under an entail containing a similar prohibition there had been granted, during the currency of a lease of which four years were unexpired, a second lease, to commence upon the expiration of the lease current. The granter died before the expiration of the current lease; and, in a reduction by the succeeding heir, the second lease was held to have, at its date, attained all the legal requisites, and therefore to be valid for nineteen years from that time.² Subsequently a lease, dated three years anterior [105] to the expiration of the current lease, was, on the same principle, sustained to the same effect.³ But the latter case having been reversed upon appeal, and the sound principle having been restored and enforced, an heir in possession having granted a lease with absolute warrandice to commence at a future term, and, before the arrival of that term having forfeited his right to the estate, it was decided that the next heir having obtained possession was not bound to implement the lease, but that the granter was liable in damages.⁴

5th, If the rent be inadequate at the date of granting the lease, the lease will be reducible. A lease of lands was granted by an heir of entail in implement of an agreement entered into some years previous to its date. On trial and motion for entering up the verdict, it was held to have been proved that the rent was inadequate at the date of granting, and therefore that the lease must be reduced. The erection of a dwelling-house at an expense much greater than was necessary for a farm-house and steading suitable to the lands could not be taken into account in fixing what rent would be adequate.⁵

Inadequate
Rent.

6th, Grassum is a sum of money paid or promised to the lessor, besides the periodical rent, but which necessarily effects a diminution of that rent.⁶ Grassums were originally deemed the distinguishing marks of that species of leases called rentals,⁷ but were afterwards adopted by the proprietors of entailed estates, either for the direct benefit of the granters, or as the means of creating pro-

¹ E. of Aberdeen v. Farquhar, 6 Dec. 1731. Sandf. on Ent. pp. 213-14, Note.

² Campbell v. Love, 1772; Mor. 15519; 5 B. S. 622.

³ Redhead v. Kerr, 1792; Bell's Cases 202.

⁴ 5 Feb. 1794; 3 Pat. 309.

⁵ Downie v. Campbell, 31 Jan. 1815;

F. C. 182. Sandf. on Ent. 334. More's Notes, clxxxvi.

⁶ Gray v. Skinner, 10 June 1854, 16 D. 923, 26 Jur. 471.

⁷ Balfour 203. 2 Craig, x. 4. 2 Stair, 9, 16, 17, and 20. 2 Mackenzie's Inst. vi. 9. 2 Ersk. vi. 37.

⁸ Craig, *ut sup.* compared with 2 *ib.* 34. Stair and Mackenz. *ut sup.*

visions for their widows and children, who, by reason of the limitations, would otherwise have been provided for very scantily.¹

In one of the earliest cases (relied upon in subsequent cases by both parties) in which the legality of grassums was adverted to, an heir under an entail prohibiting leases with diminution of the rental had, for certain sums, taken from the tenants bonds or bills payable in equal yearly proportions during the currency of their leases. This transaction was impugned as a device to defraud the heir in succession by anticipation of rent, and was defended as grassum. The bonds and bills, as securities for future rents, were awarded to the heir in succession.² In strictness there was no question relative to grassum, because the heir having claimed the securities as anticipated rent, his right to acquire them as such was the only matter with which the Court could deal; and whatever therefore [106] was said concerning grassum was *obiter*.³ While the opinions of the Court tend to favour the legality of grassum, the judgment, if grassum and anticipation of rent be identical, is authority against it.⁴

None of the three succeeding cases⁵ affords a precedent, although in all of them grassum existed. There was in the first case (as formerly stated) much special matter, particularly a deed containing a power to grant leases on whatever terms the heir in possession thought proper. In the second, the cause of action was the recovery of monies expended upon improvements under the statute, and the defence was reimbursement by grassums; but as, *pendente lite*, the pursuer was himself taking grassums, he did not, and could not, impugn their lawfulness. Therefore, although the judgment recognised the legality of grassum, it forms, on that point, no precedent, because relative to matter not *coram judice*. The legality of grassum was put in issue in the third case, but not decided. The entail contained no limitation upon the power of granting leases. A reduction of a lease granted for the last permanent rent with grassum having been brought, after a proof two questions were raised—*first*, whether the lease was granted for a diminished rent? and, *second*, whether a diminished rent formed a ground of reduction? The Court having been of opinion that there was no diminution of rent, sustained the lease, and held that there was no occasion to decide the second question.

¹ 2 Ersk. vi. 37. 1 Bell's Com. 73. Sandf. on Ent. 312, Note f. 1 Bell on Leases, 127, Note (b).

² Denham v. Wilson, 1761, Mor. 15,512.

³ Per Lord Eldon, C., in D. Buccleuch v. D. Queensberry's Exrs. 12 July 1819, 1 Bligh, 339-534.

⁴ Per Lords Eldon and Redesdale in Buccleuch v. Queensberry's Exrs., *ut sup.*

⁵ Leslie v. Orme, 1779, Mor. 15,531; aff. 1780, 2 Pat. 533. Elliot v. Elliot, 1793, Mor. 15,622. Elliot v. Currie, 1798, Mor. 15,450.

When, consequently, the question emerged in a series of important and noted cases,¹ it was perfectly open. Although in the first case there was grassum, the lease was, independently, held to be bad by reason of excessive duration.² But in the succeeding one the lawfulness of grassum was very solemnly tried. While in the entail alienation was prohibited, power was given to the heirs in possession to grant leases for the periods of their own lives or the lives of the lessees, but "without evident diminution of the rental." On a renunciation of a lease for fifty-seven years, one for ninety-seven with additional grassums was granted, which having been reduced on account of excessive duration, the lessor appealed. Meanwhile most of the current leases having been renounced, there were leases granted in their stead, some for the lives of the lessees, [107] some for forty-seven or fifty years, and others for such periods of alternative duration as the lessor should be found entitled to grant; and it was agreed that, if the lessor should ultimately be held to have a right to grant long leases to each lessee, there should be granted a lease for ninety-seven years upon a payment of additional grassum. In a reduction (leases calculated for bringing the points to trial having been selected) the first and principal point was the validity of leases of the duration permitted by the entail, but for which grassums had been given; and the second was the validity of the leases for alternative periods. The leases of both classes were reduced. The *ratio* of the reduction of the former was, that they were struck at by the clause prohibiting alienation, as well as by the condition in the permissive clause against diminution of the rental. Those of the leases for alternative periods in which grassum was taken were set aside, on the grounds, *first*, that they were merely substitutes for the leases which had been renounced, and consequently liable to every objection applicable to them; and *second*, that they formed parts of a system by which the lessor and lessees had combined to defraud the heirs in succession. But certain leases were sustained because it was held that there had been no grassum, and that the rent had been raised.³

In the interim there arose another class of cases out of the entail of another estate which had belonged to the same lessor. The entail contained a prohibition to "dispose," and "to set tacks or rentals for any longer space than the setter's lifetime, or for nine-

Cases of
Queens-
berry leases

Queens-
berry leases
—con-
tinued.

¹ *E. Wemyss v. D. Queensberry's Exrs.*, 25 May 1813, and other cases, commonly called the "Cases of the Queensberry Leases."

² *E. Wemyss v. D. Queensberry and*

Welsh, 25 May 1813, F.C. 298; aff. 1819, 5 Dow 293.

³ *E. Wemyss v. Exrs. of D. Queensberry and Murray*, 17 Nov. 1815, F.C. (1st Div.)

four times the amount paid by him to the landlord. The remainder of the coal-field was, at the date of the action (to be immediately noticed), in his own possession, and unwrought. The sublessees carried on extensive operations by working seven pits at the date of the action, and more were in the course of being sunk.

A succeeding heir of entail raised an action of reduction of the lease on the ground that it was an alienation, or an undue exercise of the power of leasing, and in contravention of the entail, and of the Statute 6 and 7 Will. IV. c. 72 (13th August 1836). A proof was allowed of the matter averred in support of the reasons of reduction. The Court held, *first*, that in a reduction there must be unfairness, fraud, or gross and culpable negligence, operating as mischievously [114] as fraud could operate; and, *second*, that the proof did not amount to the doctrine ruled; therefore, that the lease was not in contravention either of the entail or the statute, but must be deemed as at its date to be a fair and equal contract, under which the lessee took the risk of an unopened and untried field, which then had no practical means of communication with markets, and which was proved not to have been wrought to profit by the greater number of the sublessees. The lease therefore was sustained as valid.¹

By reason of the special and complicated details which this case presents, and on the elaborate combination of which it was determined, it would be difficult to question the soundness of the decision. But in dealing with it as embodying doctrine, it must be kept in view that there are involved in it important principles, against the abandonment or compromise of which it is material to guard. As will be shewn hereafter in treating of the "Mineral Lease," there is a fallacy in including minerals in the class of subjects which can be let, in the true import of the term. Such a mineral lease has, however, been so long established and recognised that it must be dealt with as an integral portion of law, both as to phraseology and practical results. But the anomalous effects of so doing are well shewn by the application of the doctrine to leases under entails. The heir in possession may lease, but he cannot do so without wasting the substance, and consequently injuring his successors. Practical restrictions therefore are necessary, as other-

¹ *Muirhead v. Black, &c.*, 13 June 1855, 17 D. 875, 27 Jur. 454. In a subsequent case between the same parties (13 Feb. 1858, 20 D. 692, 30 Jur. 307) the question was raised whether the right of an heir of entail could be sustained in working the minerals to his own profit, but to the exhaustion of the estate

and the injury of subsequent heirs. The case generally, and the opinions of the Court, are so complicated with special matter that it cannot be said that a precise answer was given to this question; but the import may be deemed to be that he cannot. The details of this case will be given hereafter.

wise, by the rapidly increasing consumption, and by the progressive facilities of working and transport, the mineral might be speedily exhausted. As restraints on excessive working, a lordship and the exclusion of subtenants appear to be just and conformable to the rules for governing or reconciling the adverse interests. Here the propriety of those restraints was indicated in one opinion (that of Lord Deas), although the absence of them was not deemed to be obstand under the special matter; and in another (Lord Ivory's) it was held to create invalidity. In dealing with the decision as a precedent, the qualifications thus to be introduced, whenever general doctrine is to be elicited, must be gravely regarded.

[In a late case it was held that an heir of entail was entitled, notwithstanding a prohibition, to communicate the coal-levels on the estate to a neighbouring colliery, so far as such communication might be necessary or beneficial for the working out of the minerals, and not permanently detrimental to the mines. But this was held subject to the condition that the communication should be built up whenever its purpose had been served, so as to prevent the flow of water from the adjoining mines. The ground of the decision was that the heir in possession was entitled to work the minerals, and that the prohibition in question was not auxiliary to any of the cardinal prohibitions, and not required either for the preservation of the estate or securing its transmission to the succeeding heirs.¹]

II. Woods.—The power of leasing woods lies under serious limitations. The heir in possession may cut woods during his lifetime, but with his life the right expires; and what at his death remains uncut [115] accrues as *pars soli* to the succeeding heir.² As his right of cutting must be the measure of his right of leasing, a lease (assuming that the contract applies to woods) during his life only can be validly granted. In a case of comparatively early date, an interlocutor that the right of granting subsisted "no longer than for the granter's lifetime" was overruled by a subsequent interlocutor, that "if the woods were ripe for cutting at the time of the seller's death, the deed (of sale) is still a good subsisting deed." But a final decision was prevented by an extrajudicial settlement.³

The efficacy of a contract made previously to the death of the heir contracting to give a right to continue the cutting after his death, seems again to have been recognised, but with an important

Clerk v.
Clerk.

Leasing of
Woods.

Heir's right
of cutting
wood.

Effect of
heir on con-
tract or
lease of
woods.

¹ [Clerk v. Clerk, 20 March 1872, 10 Macph. 647.]

² [Bell's Com. 52. Sandf. on Ent. 276-9. Hamilton v. Viscountess Oxford, 1757, Mor. 15,408.

³ Pringle v. Scott, 1730. Sess. Pap. Adv. Lib. cited 1 Bell's Com. 53, and mentioned as a point debated but not decided, Mor. 5413.

modification. Where the whole of the woods had been sold, the executors were found to be entitled to the price of the portion which had been cut at the time of the death, and the next substitute to the price of the portion which remained uncut.¹ The right of the purchasers to continue to cut until the contract was implemented was here assumed. Little weight, however, can attach to the decision as a precedent to prove the continuance of the right of cutting after the death of the heir contracting. Although the right of the next substitute to the uncut wood as *pars soli*, and the danger of sanctioning prospective contracts, were points pleaded as establishing that the price of that portion accrued to him, no attempt to void the contract and to stop the cutting appears to have been made. The question having arisen, not with that substitute himself, but with his creditors, the object was not to preserve the woods, but to obtain their value.

In a subsequent case, in which, after the death of the heir contracting, an attempt was made to enforce a contract disposing of natural and planted woods, it was found that the planted woods could not be cut after the death of the heir contracting; and because the natural woods were not ripe for cutting at the date of his death the contract was reduced.² While the prohibition to cut the planted woods was absolute, an inference may perhaps be drawn that, had the natural woods been ripe, they might have been cut, notwithstanding the death of the heir contracting. But the decision of that matter was plainly not contemplated, because the unripeness was determined to be *per se* a conclusive *ratio* for reducing. Accordingly, all inferences from these cases in favour of the *post-mortem* subsistence of the right have been subsequently disregarded, and the absolute cessation [116] deemed to be so clear that the contract was held to have been necessarily terminated at the very instant of the death of the heir contracting, and the purchasers were obliged to account for the price of the wood cut between the time when the death happened and the time when the event came to their knowledge.³

Although (as far as has been observed) the rule appears to be applicable to all kinds of woods indiscriminately, the application of it to *silvæ cœduæ* allotted for periodical cutting may deserve consideration. As the proceeds of woods of that description are deemed to be portions of the usual profits derivable from the land, the heir in possession ought apparently to have the same powers

¹ *Stewart v. Exec. of Stewart*, 1761, Mor. 5436.

² *Lord Cathcart v. Schaw*, 1755, Mor. 15,403-4; aff. 1756, 1 Pat. 618.

³ *Veitch of Ellilock*, 1 Bell's Com. 53, Note. *Sandf. on Ent.* 267-9.

over those woods as over agricultural and mineral produce, and consequently the right to lease them for such definite periods as, in the exercise of sound administration, are necessary for enabling him to draw the fair profits. This result is favoured by the doctrine which relates to the powers of liferenters in leasing woods of this nature.¹

The power of cutting can be exercised only over those woods, of whatever species, which have come to maturity. In two of the cases from which the *post-mortem* subsistence of the power might have been inferred, the necessity of the ripeness, even of the *silvæ cœdæ*, having been assumed,² and in the third, having been expressly determined,³ the rule is fixed,⁴ and extends to woods planted by the heir in possession.⁵ The right of cutting, for gain, planted woods, although ripe, might, it has been said, be very questionable, if the point could be held to be open.⁶ And [it has been held] that the cutting of wood necessary for the comfort and amenity of the mansion-house is barred in extreme cases.⁷

Extent of
heir's power
to cut
woods.

The heir in possession cannot let the mansion-house, offices, garden, and pleasure-grounds, except for a year, or upon a lease to terminate with his life. This restriction has by some been thought to have originated from the expediency of retaining possession of the seat of territorial jurisdiction, and by others, from the old [117] maxim (now exploded) that, as the Act 1449 did not include houses, the contract was personal only, and therefore expired with the life of the granter.⁸ But whatever was the origin, the doctrine is settled, that leases granted in contravention are ineffectual against the succeeding heir, and are reducible by him.⁹ No lease can be granted under the statute 10 Geo. III. c. 51, s. 6, of the manor-place, offices, gardens, and adjacent inclosures, which have been usually in the natural possession of the proprietor; and building leases shall not be granted of any lands within three hundred yards of the manor-place. A lease, comprehending the "whole

Art. 12.—
Limitation
of power to
lease the
Mansion-
house and
its appur-
tenances.

Mont-
gomery
Act.

¹ Fergusson v. Fergusson, 1737, Mor. 8254.

² Pringle v. Scott, and Stewart v. Exec. of Stewart, *ut sup.*

³ Lord Cathcart v. Schaw, *ut sup.*

⁴ 1 Bell's Com. 52. 3 Ersk. viii. 29, Note, 245. *Per* Lord Pr. Blair in Gordon v. Gordon, 24 Jan. 1811, F.C. 161, 165-6.

⁵ Mackenzie v. Mackenzie, 1824, 2 S. 775.

⁶ 1 Bell's Com. 53. *Per* Lord Pr. Blair in Gordon v. Gordon, *ut sup.*

⁷ [Boyd v. Boyd, 2 Mar. 1870, 8 Macph.

637]. 1 Bell's Com. 52-3. Ersk. and Note, *ut sup.* Mackenzie v. Mackenzie, *ut sup.* Bontine v. Carrick, 16 June 1827, 5 S. 811.

⁸ Opinions in D. of Buccleuch v. Exrs. of D. of Queensberry, 7 Mar. 1816, F.C. 105, *vide* Sess. Papers, Adv. Lib. Sandf. on Ent. 279, 81.

⁹ Sandf. on Ent. Lord Cathcart v. Schaw, 1755, Mor. 15,403; *aff.* 1756, 1 Pat. 618. Leslie v. Orme, 1779, Mor. 15,530, 2 Hailes 832; *aff.* 1790, 2 Pat. 533.

home-farm and parks next the mansion-house, excepting about twenty acres," having been challenged under the statute, was reduced. The case, however, was not pure, for it involved the objection of extraordinary duration. But while the opinions were founded upon complex grounds, the objection under the statute was held to form an important ingredient.¹

Rosebery
Act.

As already indicated, the Statute 6 and 7 Will. IV. c. 42, embodies an express provision, that nothing contained in it shall authorise a lease of the home-farm, or of the mansion-house and offices, or of the garden, lawn, park, or policy, for any period beyond the life of the heir in possession, and that in case any such lease shall be granted it shall be null and void.

SECTION II.—LIMITATION BY FEE AND LIFERENT.

Art. I.—
Powers to
fiar thus
limited.

Although there exists a nominal right of liferent and fee, but really an unburdened right in the fiar, his powers are necessarily equal to those of an ordinary proprietor in fee-simple.² But the powers of leasing of both the fiar and liferenter are limited, if there exist a right of fee, burdened with a proper liferent, whether created by a reservation, deed of constitution, courtesy, or terce.

Locality
lands.

A fiar burdened with a liferent has not the power of leasing an agricultural or urban subject without the consent of the liferenter; and as (which will be immediately shewn) a liferenter can grant a lease for his own lifetime only, the fiar and liferenter generally concur in leasing for an absolute term.³ From the limitation are [118] excepted the powers of a husband over lands out of which an annuity has been granted, or over which a locality has been constituted, in favour of his wife. In marriage-contracts there is generally inserted a power to lease those lands;⁴ but, independently, leases granted in the exercise of fair administration will be obligatory, notwithstanding the husband's decease.⁵ Anciently a contrary doctrine was maintained,⁶ but the rule was established after solemn consideration.⁷ The exercise of the power must, however, be *bona fide*; for as a husband is not entitled to deprive his wife of her right of locality or liferent, in whole or in part, even by onerous deeds subsequent to her infetment, and far less by

¹ Turner v. Turners, 6 Dec. 1811, F.C. 363.

² 3 Ersk. viii. 35-49. 1 Bell's Com. 56-7. 1 Sandford on Succession, 237.

³ 1 Bell's Com. 62, Note.

⁴ 1 Jurid. Styles, 4th ed. 197-8.

⁵ 1 Bell on Leases, 104.

⁶ Dirl. and Steuart, 270. 2 Ross' Lect. 502.

⁷ Countess of Moray v. Steuart, 1772, Mor. 4392, 1 Hailes 485, 5 B. S. 619; aff. 1773, 2 Pat. 317. 2 Stair, ix. Note by Brodie, vol. i. s. 1, p. 369.

gratuitous or fraudulent deeds, so he cannot, under colour of a lease, give away any part by letting at an undervalue and out of the course of due administration.¹

More extensive powers over woods and minerals are possessed ^{Woods.} by a fiar thus burdened. A fiar is entitled to cut, and therefore to lease, woods,² but under the limitation, *first*, of setting apart a portion for the use of the liferenter;³ and, *second*, of not interfering with the shelter or amenity of the estate.⁴ But where the fiar's right of possession, and of consequent administration, is, by the terms of conveyance, excluded during the life of the liferenter, and is vested in trustees, the fiar is not entitled to cut growing timber.⁵

A fiar has a right to work and dispose of, and consequently ^{Minerals.} to lease, minerals, reserving what shall be necessary for the supply of the lands, paying surface damage, and having regard to the amenity of the manor-house and estate.⁶

As the right of a liferenter is purely usufructuary, he is <sup>Art. 2.—
Powers of
liferenter.</sup> entitled to such possession and ordinary administration only as will entitle him, during his own life, to reap the profits *salva substantia*.⁷ In [119] consequence he cannot grant a lease to endure longer than his own lifetime.⁸ Even a liferenter by reservation (the most favoured class) being barred from leasing for a longer period, a lease by one beyond his own lifetime expires upon his death.⁹ Nor, if the lease exceed the duration limited, is the fiar, although he continued for years to draw rents after the grantor's (liferenter's) death, held to have homologated or to be barred from reducing.¹⁰ Although a lease of an absolute duration (five years), let by a liferenter, was sustained after the grantor's death, the decision is not an exception to the general rule, because the *ratio* being "in respect the bairn was a pupil,

¹ Robertson v. Peter, 1777, 5 B. S. 619. Countess of Galloway v. Mackenzie, 1778, 5 B. S. 620. Laing v. Denny, 1827, 5 S. 903.

² Dickson v. Douglas, 1823, 2 S. 152.

³ Stanfield v. Wilson, 1680, Mor. 8244.

⁴ Dickson v. Douglas, *ut sup.*

⁵ Tait v. Maitland, 4 S. 247.

⁶ D. of Roxburghe v. Duchess of Roxburghe, 19 Jan 1861, F. C. No. 23, p. 66. Dickson v. Douglas, 1823, 2 S. 153.

⁷ Inst. l. ii. t. iv. and v. Dig. l. vii. t. i. l. 1 and 9. Vinnius, lib. ii. t. iv. Voet ad Pand. l. vii. t. i. s. 3, *et seq.*

2 Stair vi. 1 and 4. 2 Mackenz. Inst. ix. 35. 2 Bankt. vi. 24 and 28. 2 Ersk. ix. 39, 40, 56, 57. 2 Ross' Lect. 500. 1 Bell's Com. 62.

⁸ Balfour 206, cxxxii. 2 Craig, ix. 9, 13. 2 Stair ix. 9, Note by Brodie. 2 Bankt. vi. 34, and ix. 38. 2 Ersk. vi. 21, and ix. 57. 1 Bell's Com. 62, Note 5. Bell's Pr. 1057. More's Notes, cxxiii. Liddell v. Home, 16 Dec. 1561. Balfour, *ut sup.*

⁹ Ersk. *et* Bell's Com. *ut sup.* Lady Crawfordjohn v. Glaspin, 1611, Mor. 8252. Fraser v. Middleton, 1794, Mor. 8256, 7849.

¹⁰ Earl Marischall v. Tenants, 1630, Mor. 15,215.

and the father his administrator in law,"¹ the deed was deemed to have been made by the father, not as liferenter, but as administrator for his son. Notwithstanding the grantor's death, a lease by a liferenter subsists until the ensuing Whitsunday.² At that term the lessee may be removed;³ but if he be not, although anciently held otherwise, he is entitled to possess until there be a regular removal.⁴

Under these restrictions relative to duration, a liferenter has a right to exercise the power of leasing agricultural or urban subjects in every respect as an ordinary proprietor.⁵ In the constitution of a locality, or other liferent right, the grantor confers powers of leasing conformably to those recognised by law.⁶ Where a contract of marriage, although limiting the amount of annuity, conferred to that extent a full right to the profits and also powers of letting and of removing, the deed was held to confer a locality right, giving powers of leasing as ample as those of a proprietor; and leases granted by the liferentrix were sustained, although the rent which might have been obtained upon new leases would have considerably exceeded the amount of her specific annuity.⁷ From this decision, as well as [120] from the absence of an interest to challenge, it follows that a liferenter may let at an undervalue. In other respects a liferenter's full right of administration has been recognised. The rents of an entailed estate having been payable wholly at Martinmas, and constituted "forehand rent," a liferenter by locality was held to be entitled to enter into an arrangement with the lessees, by which the rents were made payable by moieties at Martinmas and Whitsunday.⁸

The powers of a liferenter to lease woods and minerals are very limited, in consequence of the rule that he must possess *salva substantia*, and the adoption of the *cautio usufructuaria* of the Roman law⁹ enforced by the Statutes 1491, c. 25, and 1535, c. 15, conformably to which a liferenter must find surety not to waste or destroy certain enumerated subjects, including woods.¹⁰ *Silvæ*

¹ *Ross v. Tenants*, 1612, Mor. 15, 211.

² 1491, c. 26. *Balfour* 458, c. xi. *Craig, Stair, and Bank*, cit. 2 *Ersk.* vi. 49. 2 *Ross' Lect.* 477. 2 *Bell on Leases*, 104. *Thomson v. Merston*, 1628, Mor. 8252.

³ *Ersk. and Thomson v. Merston*, ut

⁴ *Balfour* 506, c. xxxiii. and 458, c. xi. 2 *Stair*, ix. 9. 2 *Bank*, vi. 34. 2 *Ersk.* vi. 49, Note (by Ivory) 133. *Ross' Lect.* ut *supra*. *Winraham v. Henderson*, 1621, Mor. 15, 212. *Johnstone's Treas.* 1803, Mor. 15, 207. *Udney v.*

Brown, 1 Dec. 1802, n. r., noticed in *Johnstone's case*.

⁵ *Kames' Eluc.* 60. 2 *Ersk.* ix.

⁶ *Bell's Pr.* 1181.

⁷ 1 *Jurid. Styles*, 2d edit. 184-5.

⁸ *Pirie v. Murray*, 1766, Mor. 8248.

⁹ *Gooden or Chisholm v. Chisholm*, 2 Dec. 1829, Fac. Coll. No. 27, p. 151, 8 S. 165, 2 *Deas and A.* 83.

¹⁰ *Dig.* l. viii. t. i. l. 23, et t. ix. *Voet ad. Pand.* l. vii. t. viii. pp. 494-8. *Cod.* l. iii. t. xxxiii. l. 4.

¹¹ 2 *Stair*, vi. 4. *Mackenz. Ob.* 101 and 128. 2 *Mackenz. Inst.* ix. 45. 2 *Bank*, vi. 27. 2 *Ersk.* ix. 59.

cædwe, ripe, and divided into different portions to be cut annually, and therefore yielding a constant periodical return, may be leased by a liferenter,¹ although anciently an opinion seems to have existed that the right was restricted to what was necessary for the purposes of the estate.² But liferenters (those by reservation excepted) have no right to dispose of *silvæ cædwe*, if not allotted for annual cuttings, although in use to be cut and sold once in twenty or twenty-five years, and although they should, during the liferent, arrive at maturity, because they are not intended to yield yearly returns. This rule is deducible from the older Books, in which woods allotted for *annual* cutting being only mentioned as subject to sale, those not so allotted are necessarily excluded.³ In the modern Books the rule is explicitly laid down,⁴ and is sanctioned by decisions. Although in one case the decision proceeded, not upon the general point, but on the special ground, that after the death of the liferentrix woods previously sold by her could not be cut, yet the existence of the rule may be gathered;⁵ and by a subsequent decision the rule was established.⁶ The rule anciently included liferenters by reservation;⁷ but the exemption is now fixed law, it having been decided that they are entitled to cut ripe *silvæ cædwe*, although not divided into annual allotments, conformably to the usage of the part of the country where the woods are situated.⁸

Standing woods, although mature, cannot be leased by a life-renter, who is not entitled to cut at all woods which do not spontaneously grow up again, and of those which do he is entitled to cut, subject to the inspection of the fiar, only such portions as are necessary for the purposes of the estate.⁹ But this rule may be modified by the terms of the deed of constitution.¹⁰

Voet lays down the doctrine, that a liferenter is entitled both Minerals.

¹ Dig. l. vii. t. i. l. 10. Dirl. and Steu. 469 (*voce* Woods). ² Stair, iii. 74. ³ Bank vi. 6 and 26. ⁴ Ersk. ix. 58. ⁵ 1 Bell's Com. 63. Bell's Pr. 1058. More's Notes, *ut sup.* Sandf. on Succ. 120-1. Cra. of Monsewell v. Children, 1663, Mor. 8253, [4 B. S. 138.] Ferguson v. Ferguson, 1737, Mor. 8254, Elchies (Liferenter, l. Gray v. Seton, 1769, Mor. 8250, [Halles 1067.] Dickson v. Douglas, *ut sup.*

² Craig, viii. 17.

³ Dirl. and Steu. p. 469 (*voce* Woods). ⁴ Stair, iii. 74. [But see M'Alister's Trs. v. M'Alister, 27 June 1851, 13 D. 1239.]

⁵ 2 Bank. vi. 6. ⁶ Stair, ix. 58. ⁷ 1 Bell's Com. 63. Bell's Prin. *ut sup.*

⁸ Lang v. Duke of Douglas, 1752, Mor. 8246.

⁹ Gray v. Seton, *ut sup.*

¹⁰ Cra. of Monsewell, *cit.*

¹¹ 2 Ersk. ix. 59. ¹² 1 Bell's Com. 63. Bell's Prin. and Ferguson v. Ferguson, *ut sup.*

¹³ Dig. l. vii. t. i. l. 11. ¹⁴ 2 Craig, viii.; compare sec. 17 and 18. Dirl. and Steu. 41 and 469. ¹⁵ Stair, iii. 74. Mackenz. Ob. 130. ¹⁶ Ersk. ix. 58. ¹⁷ 1 Bell's Com. 63. Sandf. on Succ. 120-1. Stanfield v. Wilson 1680, Mor. 8244. Duchess of Hamilton v. Duke of Hamilton, 1723, Robertson's App. 443. Lang v. Duke of Douglas, *ut sup.* Dickson v. Douglas, *ut sup.* [M'Alister's Trs. v. M'Alister, 27 June 1851, 13 D. 1239.]

¹⁸ Dingwall and Curator v. Duff, 14 Dec. 1833, and 8 March 1834, 12 S. 216, 541.

to begin and to continue the working of minerals.¹ Stair indicates an opinion that, where there is no apparent hazard of exhaustion, liferenters may be entitled to work "going mines," not exceeding the measure and method accustomed by the fiar.² Notwithstanding these *dicta*, the rule applied to standing woods has been applied to minerals, unless there be an express power to work "going mines;" and even in that case, the exercise of the power will be measured by the nature and extent of the customary operations of the fiar.³ In one case a general liferent of heritable and moveable property, and of leases and other rights, was held to include the rents of minerals under lease;⁴ and in another, a liferenter by [122] constitution was, upon the ground of *bona fide* consumption, protected from repayment of rents derived from minerals.⁵ But neither case can be deemed to impugn the rule limiting the powers of liferenters.⁶ In the former a lease for nine hundred and ninety-nine years had been made previously to the grant of the liferent deed, and by the express terms of that deed, combined with other special matter, it was clearly the intention of the granter to convey the rents accruing under the lease. In the latter the *bona fides* was strong, resting upon the grant being capable of being so interpreted as to include minerals, united with the fact that the rents of them were paid to the liferentrix by the factor under a judicial sequestration. But the protection was admitted with some difficulty.

On the authority of the decision, that a liferenter by reservation may sell *silvæ cædunt* although not laid out in annual allotments,⁷ Bankton holds that a liferenter of that class may work a going coal as he was accustomed to do.⁸ But Erskine says that "liferenters, by reservation, seem to have no stronger right than simple liferenters as to woods, mines, and minerals," and indicates dissent from the decision relied upon by Bankton.⁹ As neither in the

¹ Voet ad Pand. l. vii. t. i. s. 24.

² 2 Stair, iii. 74.

³ 2 Craig, viii. 18. Dirl. and Steu. 40-1. Mackenz. Obs. 130. 2 Bank. vi. 6 and 26. 2 Erak. ix. 57. 1 Bell's Com. 62-3. Lady Lamington v. her Son, 1628. Mor. 8240. Preston v. Preston, 1677, Mor. 8242. Heirs of Roseburn, June 1727, not reported, but cited by Bank. and Erak. *ut sup.* Belchier v. Moffat, 1779; [Mor. 16, 363]. Swinton v. Duchess of Roxburgh, 1 Feb. 1814, F. C. No. 147, p. 532. Dickson v. Douglas, *ut sup.*

⁴ Waddel v. Waddel, 21 Jan. 1812. F. C. No. 138, p. 461.

⁵ D. of Roxburgh v. Duch. of Roxburgh, 17 Feb. 1815, F. C. No. 59, p. 227, 1 Bell's Com. 63, Note.

⁶ [On the contrary, a general settlement conferring a liferent, or a liferent of the granter's whole estate as a universitas, carries the right to the rent of minerals under lease. Eiston v. Eiston, 10 June 1831, 9 S. 716. D. Roxburgh, cit. Guild's Tre. June 29, 1871, 10 Macph. 910. Bell's Pr. 1042.]

⁷ Ferguson v. Ferguson, *ut sup.*

⁸ 2 Bank. vi. 6. [See Eiston v. Eiston, cit.]

⁹ 2 Erak. ix. 58.

other Books, nor by any decision (as far as has been observed), is the distinction taken, it does not appear to be warranted by sufficient authority.

SECTION III.—LIMITATION BY CONJUNCT PROPERTY.

Conjunct proprietors, however various their shares, having each a *pro indiviso* right, must all unite in exercising acts of ownership,¹ subject to the maxim *in re communi melior est conditio prohibentis*.² These rules apply to leasing. In no respect does a lease by common proprietors differ from one by a single proprietor, except in the necessity of joint concurrence. The inherent community of right and interest operating at the origin of the grant continues equally operative throughout its course; and in acts by which its subsistence is to be affected all must join.³ But the rule has occasionally been modified. In the case of common adjudgers it has been decided, *first*, that one adjudger could not pursue a removing unless he offered a more solvent tenant or a greater rent, in which case the interest of any other person *in re communi* could not, [123] without fraud, hinder the common interest of all concerned;⁴ and *second*, that there is the same bar, unless the adjudger pursuing the removing find caution to his co-adjudgers for the amount of rent corresponding to their interest.⁵

Companies by which lands or houses were let seem to have been known at a period comparatively early, but no details are given relative to their nature or operations.⁶ In modern times copartnerships for acquiring land for the purpose of letting merely, if they exist at all, are of very rare occurrence. But as associations to buy in order to resell are frequent, there must, during the periods previous to the resale, be many instances of leases by such joint proprietors. There are, especially in the larger towns, numerous copartnerships for the purpose of acquiring houses, either for lease or sale, the details of the constitution and management of which have occasionally been brought under judicial cognisance.⁷ The titles are occasionally taken to one of the partners only, who grants a declaration of trust; but they are also often taken to them jointly

¹ 2 Stair, vi. 10, and ix. 43. 2 Ersk. vi. 53. 1 Bell's Com. 63.

² Bell's Pr. 1074-5. Pollock v. McLeod, 28 June 1839, 1 D. 1135, 11 Jur. 567.

³ 2 Stair, ix. 43 Ersk. ut sup. 2 Bell on Leases, 60-1. Murdoch v. Inglis, 1679, 3 B. S. 297. Bruce v. Hunter, 16 Nov. 1808, F.C., p. 5.

⁴ A v. B, or Forbes v. Buchan, 1680, Mor. 2448.

⁵ Halliday v. Bruce, 1681, Mor. 2449.

⁶ 1 Stair, xvi. 4.

⁷ White v. Macintyre, 12 Jan. 1841, 3 D. 334, 13 Jur. 145.

that they shall remain for the residence of the incumbent conformably to previous statutes. Under this statute a doubt may arise whether incumbents can let their manse, as residence is the object for which the statute provides. But this would be a rigorous construction. The object of the statute is to secure to churchmen places of residence, but not to compel them to reside in them if unsuitable. In practice, manse situated in towns or in the neighbourhood are occasionally let. The validity of such leases has been indirectly sanctioned by decisions.¹ [And it has been decided that heritors have no right to interfere with the letting of a manse furnished for two months in summer, when no injury is done to the building.²]

Extent of minister's right to manse and glebe.

In modern times it has been held as a general doctrine that there is vested in churchmen such a right of property as entitles them to derive those benefits only which can accrue *salva substantia*, and which will not be injurious to their successors.³ But the incumbent has no right to the glebe or manse until induction, and therefore is not entitled to the rents pending a dispute as to his presentation or election.⁴ The statutory rule, that the incumbent cannot let a lease of the manse or glebe to the prejudice of his successor, is laid down as being in full force.⁵ A summary removing from a manse at the successor's instance was sustained, on the ground that the right to possess the manse followed the right to the church.⁶ [A lease is not at common law, and under the Statute of 1572] effectual beyond the granter's incumbency; the right of the tenant ceases upon the death of the previous incumbent [*i.e.* on the death of the incumbent, his lessor], and the successor is entitled upon his induction to remove the tenant from his glebe, although it is not adjacent to the manse, and is in use to have been let, and although the incumbent does not intend to occupy it personally.⁷ But a judicial opinion was given that the tenant should not be in a different situation from the tenant of a liferenter;⁸ and it was said that possibly there might be cases where the rule regarding liferenters might apply, as where the glebe was let with the

Lease of glebe terminates with lessor's incumbency.

¹ Coupar v. Bruce, Maccallum v. Grant, and Lockerby v. Stirling, *ut inf.* [² Heritors of Aberdour v. Roddick, 14 Dec. 1871, 10 Macph. 221.]

³ Dunlop's Paroch. Law, pp. 174-7. [Duncan's Par. Law, 291.] Mackie v. Neill, 1738. Elch. (*vide* Glebe), No. 2. Hepburn of Humble v. Hera, of Keith and Humble, 16 Feb. 1791, n. r., noticed 2 Ersk. x. 61, Note f. Min. of Little Dunkeld v. Hera, 14 May 1791, Mor. 5153. Min. of Maderty v. Hera, 1794, Mor. 5153. Logan v.

Reid, 16 May 1799, Mor. App. Glebe. Min. of Newton v. Heritors, 1807, Mor. App. Glebe, 1.

⁴ Dunlop's Paroch. Law, p. 174. Lockerby v. Stirling, 25 June 1835, 13 S. 978.

⁵ 2 Ersk. x. 6, and Note *.

⁶ Coupar v. Bruce, 1603, Mor. 13,831.

⁷ Dunlop's Paroch. Law, 177. Maccallum v. Grant, 4 March 1826, Fac. Coll. No. 78, p. 465, 4 S. 527.

⁸ Per Lord Alloway, 4 S., *ut sup.*

consent of the Presbytery and for the obvious benefit of the clergy-man.¹ [By a Statute of 1866 the powers of ministers in regard to their glebes were enlarged, and, *inter alia*, it was enacted that, with the approval of the Presbytery of the bounds and the heritors of the parish, the minister may let the glebe, reserving seven acres thereof nearest and most convenient to the manse,—for eleven years. If the five acres be included in the lease it will terminate, so far as they are concerned, at the first term of Martinmas six months after the end of the lessor's incumbency. Grassums are prohibited. A certificate of the consent of the Presbytery and the heritors must be written on lease, and signed by the moderator and clerk of the Presbytery and the heritors' clerk.²]

Statutory power to let glebes.

[130] Lands have been mortified for the benefit of ministers of the Established Church, to the produce, and consequently to the administration, of which they are entitled by their induction.³ Although these lands have occasionally been called "glebes,"⁴ and although the rents of them have been taken into consideration in questions of augmentation,⁵ they seem to be of a different legal character, and subject to much more extensive powers of administration on the part of the incumbents than are possessed over glebes. Glebes must be administered according to fixed and precise rules of law, but the donor of mortified lands may confer whatever power he pleases; and if there be no special rules of administration, it is presumed that it was intended that the ordinary rules applicable to mortifications should be followed. Leases therefore may be granted not merely for the incumbent's life, but of the ordinary duration and on the usual terms. In one case it appeared that part of the lands were in the natural possession of the minister, and that the rents of the portions let had been progressively rising, and at a particular date were expected to yield an increased rent;⁶ which shews that the lands were managed in the usual mode.

Art. 2—*Lands mortified to parochial ministers.*

SECTION III.—UNIVERSITIES.

Aggregate corporations, although consisting of many individuals, being accounted persons, and having equally as individuals their own property, rights, and privileges,⁷ are entitled to grant

Art. 1—*General rules applicable to aggregate corporations.*

¹ *Per Lord Glenlee*, 4 S., *ut sup.*

² [29 and 30 Vict. c. 71, s. 3.]

³ *Min. of Old Deer v. Hera*, 23 Nov. 1806, F.C. *Min. of Buittle*, 22 Nov. 1809, *ib.* Note. *Allen v. King's Coll. of Aberdeen*, 23 Jan. 1811, F.C. No. 42, p. 159, 2 Connell 136.

⁴ *Old Deer and Buittle*, *ut sup.*

⁵ *Allen v. King's Coll. of Aberdeen*,

ut sup.

⁶ *Allen v. King's Coll. of Aberdeen*,

ut sup.

⁷ Note (by Ivory) 444, to 3 Ersk. viii. 37.

leases of their property, subject to rules, either general, conformably to common or statute law, or special, conformably to the constitution of the body; and, under these modifications, the deeds of their officers bind the corporators and their successors in the same manner as the deeds of a private person bind him.¹ *First*, As the corporation should so hold all its property, leases and relative deeds should be executed under the corporate name.² In the application to Parliament [131] or to the Crown for corporate rights, there is generally specified the power of granting leases.³ In the statute or charter there is ordinarily a clause empowering the body, "*et locationes rentalia seu locationes dict. terrarum tenementorum aliorumque dare et concedere.*"⁴ When the clause is in general terms the tenor of the lease is to be governed by the rules of good administration. Corporations are absolute fiars,⁵ and the rules applicable to them include the power of leasing on any terms which shall be proved to be beneficial to the body, but exclude all leases of a contrary nature. No description of warrantable or unwarrantable leases therefore can be given *a priori*, but each case must depend upon special matter. But *second*, for the security of those in whose favour leases are to be granted, they should be executed according to the form and tenor specified in the deed of constitution,⁶ or that which consuetude prescribes. In either case the lease must correspond with the rules prescribed, and be governed by them in all its results. And *third*, in all cases it will be expedient for the grantee to obtain the previous written warrant of those entitled to bind the corporation, as its council or directors; for, as each corporation has its particular constitution, a stranger may be ignorant of the number or description of the officers who can grant a valid obligation.⁷ Such, accordingly, is the style practically authorised.⁸

Art. 2—
Administra-
tors of
University
property.

UNIVERSITIES are aggregate corporations,⁹ and leases by them must be granted conformably to the constitution of the University, and to the rules of good administration. Lands which had been granted to Universities were excepted from the Act of Annexation (1587, c. 29).¹⁰ The Statutes 1669, c. 6, and 1695, c. 14, conferred upon Universities facilities for levying their rents. But it was

¹ Dirl. and Steu. p. 89.

² 1 Bankt. ii. 27. 1 Ersk. vii. 64. 2 Bell's Com. 167, 656. 1 Ross' Lect. 83. Spott. Styl. 15-16. 1 Jurid. Styl. 3d edit. 48-49. Steu. Ans. to Dirl. 89.

³ 1 Jurid. Styl. 3d edit. 50.

⁴ 1 Jurid. Styl. 3d edit. 50-53.

⁵ 1 Jurid. Styl. 3d edit. 50.

⁶ Id.

⁷ 1 Ross' Lect. 88.

⁸ 1 Jurid. Styl. 4th edit. 106; and 2 Jurid. Styl. 3d edit. 29-30.

⁹ Bell's Pr. 2188.

¹⁰ Mackenz. Obs. 231. Tock v. Parishioners of Auchtergaven, 12 Feb. 1635, there cited.

held that they were not comprehended under the statutes concerning grants of leases by benefited persons, because those statutes relate to churchmen.¹

Previously to the Statutes of 21 and 22 Vict. c. 83, the Universities of Scotland were under the immediate superintendence and control of the Crown, which power was exercised by the appointment of Commissioners to make a royal visitation. Each of those Universities had a different constitution.² The Masters of [182] the University of Aberdeen had the power of granting leases.³ An illustration of these powers is afforded by a decision, according to which an agreement settling the amount of a legacy entered into by Commissioners empowered by the Masters of that University was held to bind the University, on the principle that the major part of the members, in a regular meeting, having given commission, the deed was valid unless by the statute of foundation the dissentient members possessed a negative.⁴ And the consent of the Principal of that University to a transaction relative to the rents appears not to have been deemed requisite; for, notwithstanding it was argued that he had not consented, it was held that the Professors, subject to the ordinary legal restrictions, could act as administrators.⁵ The Masters of the University of Glasgow, in the due exercise of their powers as administrators, were found entitled to bind their successors.⁶ And it was afterwards decided that the sole right of administration of the property of that University or College (except of some parts specially conveyed otherwise) belonged to the Principal and Masters, and that the Court of the Rector and his Assessors had no legal power of interference.⁷ A distinction between the University and the College of Glasgow (indicated in the immediately preceding case) was subsequently recognised; for it was held that the College was a separate body within the University, consisting of the Principal and the Professors, called the Faculty, in whom the sole right of administration was vested.⁸ A lease granted by the Provost of the University of St Andrews, without the concurrence of the major part of the Masters, was found to be null.⁹ On the authority of that case it was

University
leases before
1858.

¹ Old College of Aberdeen v. Town of Aberdeen, 1669, Mor. 2533 and 6848, 2 Bankt. viii. 24.

² Per Lord J.-C. (Boyle) and Lord Pitmilny in Mags. of Edin. v. College of Edin., 15 Jan. 1829, F. C. No. 47, p. 333, 7 S. 255.

³ Old College of Aberdeen v. Town of Aberdeen, *ut sup.*

⁴ Ross v. College of Aberdeen, 1678, Mor. 2536.

⁵ Burnett v. Simpson, 1711, Mor. 2289.

⁶ Park v. University of Glasgow, 1675, Mor. 2535.

⁷ Leechman, &c. v. Traill, &c., 1770, Mor. voce College, App. 1.

⁸ Muirhead v. Glassford, 16 May 1809, F. C. No. 90, p. 266. University of Glasgow v. Faculty of Physicians and Surgeons of Glasgow, 12 Nov. 1834, F. C. 6, 13 S. 9.

⁹ Skeen's Case, Feb. 1684, relied on in Haldane v. Rymer and Ramsay, 1707, Mor. 2387. Barclay v. Coll. of St Andrews, 1684, Mor. 11,001, 7937.

afterwards decided generally that the Regents (or Masters) had a share in the government or administration.¹ The administration of the patrimonial and civil interests of the University of Edinburgh was conceded by the Principal and Professors to be vested solely in the Magistrates of Edinburgh, as patrons. The College was said to be a minor corporation, subordinate to the corporation of the City and Town Council;² and the rights of the [133] Magistrates, as patrons, were held to extend to the government of all its affairs.³

Universities
Act of 1853.

An important and beneficial alteration has been made by the recent Statute of 21 and 22 Vict. c. 83 (2d August 1858), entitled "An Act to make provision for the better Government and Discipline of the Universities of Scotland, and Improving and Regulating the Course of Study therein, and for the Union of the two Universities and Colleges of Aberdeen."

By the fifth section it is enacted that the *Senatus Academicus* of each of the Universities, consisting of the Principal and Professors, "shall administer its property and revenues subject to the control and review of the University Court, as hereinafter provided." One-third of the *Senatus* shall be a quorum, and the Principal shall be the ordinary president, with a deliberative and casting vote. Conformably to the eighth, ninth, tenth, and eleventh sections, the University Court of each of the Universities of St Andrews, Glasgow, Aberdeen, and Edinburgh is differently constituted, and for the details of such constitutions reference is made to the words of the statute. In terms of section twelfth, article sixth, the University Court of each University shall, subject to the provisions of the Act, have "power to inquire into and control the administration of the *Senatus Academicus*, or Principal and Professors of any College, for the revenue, expenditure, and all the pecuniary concerns of the University, and of any College therein, including the funds mortified for bursaries, or other purposes." By the fourteenth section certain persons named are appointed "Commissioners for the purposes of the Act" for a time, which must expire on the first day of January 1863. In terms of the fifteenth section, these Commissioners shall possess and exercise powers "to make such provision by ordinance as the Commissioners shall see fit, as well for the due preservation, administration, and disposal of the whole property, funds, rents, revenues, and endowments, as for the preservation and maintenance of all the

¹ *Haldane v. Rymer and Ramsay*, *ut sup.*

² *Per* Lord Glenlee.

³ *Maga. of Edin. v. Coll. of Edin.*, 15 Jan. 1829, F.C. No. 47, p. 333, 7 S. 255.

fabrics and buildings of or connected with the Universities and Colleges." The nineteenth section enacts that during the exercise of the powers of the Commissioners the powers of the University Courts shall be subordinate, but any of the rules, statutes, and ordinances of the Commissioners "may at any time after the expiration of the powers herein conferred on the Commissioners be altered or revoked by the University Court or the University, but only with the consent expressed in writing of the Chancellor thereof, and with the approval of Her Majesty and Council. Conformably to the [134] twenty-fifth section, Universities may sue and be sued by the title of "The University of," as specially named.

The Statute 1633, c. 6, declared that it shall be unlawful for the administrators to "alter, change, or invert gifts of lands or heritages to colleges to any other use than that specifick use whereunto they are destinate by the disponent himself." Craig limited the powers of the administrators of an university to grants for the period of twenty-one years or three lives, to be specially comprehended in the contract, and to be computed from the commencement of the grant.¹ But subsequently it was determined that they might grant leases to last during their own lives, where the leases were not in diminution of the rental; but being usufructuaries and administrators only, they could not give obligations to renew *in perpetuum*, and that such obligations were not valid against their successors, because the college was *corpus universitatis*, and in the same condition with royal burghs, which could not oblige their successors to the prejudice of their patrimony. Accordingly, a lease to endure during the life of the Principal, and five years after, with an obligation to renew from time to time for ever, was found to be totally null, and the receipt of rent, after the expiration of the definite period, was decided to have been, not homologation, but tacit relocation, because, for the obligation to renew there was no sufficient onerous cause alleged.² Nor could Professors do any act restricting or alienating their rents or other revenue, except for just and necessary causes.³ But the administrators were entitled to compound claims where the transaction was for the benefit of the university;⁴ and they could transact with relation to a mortification of which the event was uncertain

¹ Craig xi. 5.

² Old College of Aberdeen v. Town of Aberdeen, 1669, Mor. 2533-4 and 6848, 2 Stair viii. 20, Pardov. Coll. t. xi. § 4, 1 Bankt. viii. 24.

³ Burnett, &c., v. Simpson, *ut sup.*

⁴ Park v. University of Glasgow, 1675, Mor. 2535.

Art. 2—
Powers of
administrators.

SECTION IV.—MORTIFICATIONS.

Of a character similar to leases by the Church and Universities are those granted by the administrators of Mortifications.

In Scotland, before the Reformation, there were numerous *Hospitals*, which were understood to come under the description of ecclesiastical benefices.¹ By the canon law the superintendence of hospitals was vested in the bishop; but in Scotland a series of [136] Acts of Parliament conferred upon the chancellor, bishop, or special royal visitors, the power of visiting hospitals, and other mortifications, in order to ensure the proper application of the revenues, enforce the statutes of foundation, and remedy defects and abuses.² Proceedings to compel the administrators to account continued, until a comparatively recent period, to be at the instance of the chancellor and bishop.³ Portions of the estates of hospitals having been leased at low rents, the abuse was remedied by the operation of those statutes.⁴ No modern instance of a royal visitation of hospitals has been discovered; but upon the analogy of universities, where it has been recently exercised,⁵ there is no reason to doubt its competency.

After the Reformation (1578) the superintendence was claimed by the clergy.⁶ Lands granted to hospitals were excepted from the Act of Annexation, under the provision that the rents should not be applied to any other purpose;⁷ and they were deemed to continue to possess the privileges of the Church.⁸ The Statute 1633, c. 6, prohibited any "inversion of the revenues from the specific object enjoined by the donor, and vested the right of action for enforcing the statute in the bodies themselves or in the bishop."⁹ In 1650 a Presbytery claimed the right "to see that there be no dilapidations of the maills and duties of an hospital," and while, in consequence of the form under which it was pleaded, the

¹ Spotts. Relig. Houses, App.; Hope's Min. Pract. ch. xx. pp. 530-37; Connell on Tithes, 28; Connell on Par. ch. iv. p. 465.

² 1427, c. 27; 1457, c. 69; 1466, c. 10; 1540, c. 101; 1578, c. 63; 1696, c. 29; 1698, c. 21; Balfour 130, c. iv.; Mackenz. Obs. 11, 53, 188; 2 Bankt. viii. 23; Forbes on Tithes, 246; Pardovan Coll. b. ii. t. xiv. sec. 20; Dunlop on Poor Laws, No. 116, p. 72; Dunlop on Paroch. Law, 406.

³ Mackenz. Obs. 11, 188; Hosp. North Berwick, Jan. 1867, cited Mackenz. Obs. 188.

⁴ 2 Bank. viii. 23.

⁵ Royal Visitation of University of Edin. 1862, and of all the Scotch Universities, 1830, and of the Universities of Glasgow and Aberdeen, 1836-7, and of the University of St Andrews.

⁶ Book of Policy, c. ix. sec. 2, and c. xii. sec. 12; Spotts. Ch. Hist. 297, 300; 2 Pardov. Coll. xiv. 21.

⁷ Findoury v. Town of Brechin, 1682, Mor. 7982; Mackenz. Obs. 231; 2 Bank. viii. 23; Connell on Par. ch. iv. p. 465.

⁸ 1 Craig, xiii. 18.

⁹ Mackenz. Obs. 369; Pardov. Coll. ii. 17; 2 Bank. viii. 25.

claim was disregarded, the right of pleading it competently was reserved.¹

Powers of
Presby-
teries.

Whether the Act 1690, c. 5, could be deemed to imply the transference to Presbyteries of those powers of bishops, has been held to be questionable;² but it has also been said that those powers might probably be held to be vested in them.³ Mortifications continued to be deemed religious acts.⁴ The analogy of hospitals to matters ecclesiastical had been so far acknowledged, that, in order to facilitate the collection of their revenues, the "acts and laws," [137] relative to the levying of the stipends of the "ministers of the gospel" were extended to them by the Statute 1696, c. 14.⁵ It has been decided by the House of Lords that the Presbyteries come in the place of the bishops, to the effect at least of having a title to sue.⁶ And in one special class of cases (to be immediately noticed) those powers have been exercised by the Church Courts.

The Court of Session possesses immediate powers of controlling administrators, as in certain cases was expressly recognised;⁷ and, as in others, was not questioned.⁸ Actions for mal-administration are competent to any person who has a legal interest to benefit by the institution,⁹ and to any administrator.¹⁰

In dealing practically therefore with the administrators of mortifications, lessees should know that a transaction may be challenged by a suit before the Court of Session, or by Royal Visitors, or perhaps by the Presbytery.

Mortifica-
tions for the
poor.

The minister, elders, and heritors of a parish are, in the absence of a special destination, the administrators of property mortified for behoof of the poor generally, or given to the patrons and overseers of the poor; for to that effect they are deemed a corporation, each member having a vote.¹¹ By an Act of the General Assembly

¹ *E. of Roxburghe v. Tenants of Maisondieu*, 1650, 1 B. S. 461. The action was one of removing by a landlord against his tenants, and the Court did not respect the Presbytery's claim in this judgment possessory, reserving what could be said against the pursuer's right *in petitorio*.

² 2 Bankt. viii. 25.

³ *Dunlop on Poor Laws*, No. 115, p. 71.

⁴ 2 Dallas 530.

⁵ 2 Bankt. viii. 27.

⁶ *Mags. of Perth v. Black*, 1730; aff. 1 Cr. and St. 39. *Dunlop Paroch. Law*, 404-5.

⁷ *Merchant Company of Edin. v. Gova. of Heriot's Hospital*, 1765, Mor. 5750. *Macausland v. Montgomery*, 1793, Mor. 5010, *Dunlop on Poor Laws*, No. 117, p. 72.

⁸ *Christie v. Mags. of Stirling*, 1774, Mor. 5765. *Moore's Tra. v. Wilson*, 35

June 1814, F.C. No. 196, p. 663. *Bow v. Provost of Stirling*, 6 Dec. 1825, F. C. No. 18, p. 103, 4 S. 278; *Dunlop on Poor Laws*, *ut sup.*

⁹ *Cases of Merchant Comp. of Edin.*, of *Christie*, and of *Bow*, *ut sup.* *Ross v. Gova. of Heriot's Hospital*, 14 Feb. 1843, 5 D. 589, 15 Jur. 298, *Dunlop on Poor Laws*, No. 115, p. 72, *Dunlop Paroch. Law*, 406.

¹⁰ *Macausland v. Montgomery*, *ut sup.* *Ross v. Gova. of Heriot's Hospital*, *ut sup.* *Dunlop on Paroch. Law*, 405. *Dunlop on Poor Laws*, No. 115, p. 72.

¹¹ *Hers. v. Min. of Humble*, 1751, Mor. 10,555. *Min. of Dalry v. Newal*, 1791, Mor. 14,567. *E. of Galloway v. Min. of Dalry*, 22 Feb. 1810, F.C. No. 197, p. 594; *Cardross*, 1789, there cited; *Dunlop on Poor Laws*, No. 113, p. 70; *Dunlop Paroch. Law*, 403.

of 1700, presbyteries are directed to superintend the administration of mortifications belonging to the parochial poor, and to sue those guilty of dilapidations; and synods are enjoined to take care that presbyteries perform that duty.¹ A presbytery is entitled to sue in the name of the kirk-session, upon a grant for charitable purposes made to that kirk-session.²

Mortifications are now ordinarily constituted in the form of *Trusts*.³ In some deeds the powers of the administrators with [188] relation to granting leases are minutely described. There are inserted,—the duration, as for nineteen years, or from three years to three years,—the mode of letting, viz., by public roup,—a clause prohibiting the factor from letting at a diminished rent,—and many similar details.⁴ Other deeds are merely ordinary dispositions to administrators for the uses contemplated.⁵

As he does with relation to colleges, Craig limits the powers of the administrators of hospitals to granting leases for twenty-one years, or three lives, specially to be comprehended in the contract, and to be computed from the beginning of the grant.⁶ While administrators cannot alienate gratuitously,⁷ they can for the benefit of the mortification;⁸ and consequently they can grant leases of the duration and under the stipulations compatible with the rules of good administration. Administrators were held to be entitled to let leases "for some years" of the unfurnished apartments of an hospital.⁹ And it was decided that a lease was warrantable when its terms were beneficial to the institution.¹⁰

¹ Acts of Assembly, Act xxii. p. 28.
² Pardov. Coll. xiv. 16. [See below, note².]

³ *Maga. of Perth v. Black, ut sup.* [By 8 and 9 Vict. c. 83, s. 52, heritable or moveable property vested at the date of the Act (1845) "in the heritors and kirk-session of any parish, or the magistrate or magistrates and town-council of any burgh, or commissioners, trustees, or other persons on behalf of the said heritors and kirk-session or magistrates, or magistrates and town-council, under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh," may, from a date to be fixed by the Board of Supervision, be received and administered by the Parochial Board of the parish or combination in whom the right thereto shall be vested. Such property is either to be held by the prior administrators for behoof of the Parochial Board or conveyed to it. See *Liddell v. Kirk-Ses-*

sion of Bathgate, 14 July 1854, 16 D. 1075. *Hardie v. Kirk-Session of Linlithgow*, 15 Nov. 1856, 18 D. 37. *White v. Kirk-Session of Kinglassie*, 14 June 1867, 5 Macph. 869. *Smith's Poor Law*, p. 21, *seq.* *Flockhart v. Kirk-Session of Aberdeen*, 24 Nov. 1860, 8 Macph. 175.]

⁴ 1 Bell's Com. 38.

⁵ 2 Dallas' Styl. 532-33, and 546-7-8.

⁶ 1 Jurid. Styl. 4th edit. 9 and 51-52.

⁷ *Christie v. Maga. of Stirling, ut sup.* *Dunlop on Poor Laws*, No. 114, p. 70.

⁸ 1 Craig, xi. 5.

⁹ *Merchant Coy. of Edin. v. Gova. of Heriot's Hospital, ut sup.* *Moore's Tra. v. Wilson, ut sup.* *Dunlop on Poor Laws, ut sup.*

¹⁰ *Case of Heriot's Hospital*, noticed in *Mackenz. Ob.* 368, but without a date.

¹¹ *Town of Edinburgh v. Binny*, 1694, Mor. 9107. *Dunlop on Poor Laws, ut sup.* *Dunlop on Paroch. Law*, p. 404. [3 *M'Laren on Trusts*, 392.]

gude and patrimony of all burghs "within the realme sall be yearly bestowed at the sight of the magistrates and councill of the saides burrowes, to the doing of the commoun affaires thereof allanerly, after the zearly rousing and setting thereof, as use is, conform to his Majesty's formes, acts, and statutes, anent the employing of the common gude within the saidis burrowes."

Let of
customs.

In terms of these statutes, that part of the common good which consists of imposts, customs, and similar branches of revenue, ought to be let annually.¹ In one case, as appears, not from the report, but from the pleadings,² a lease for six years of the impost on wines was sustained. As formerly stated, there was pleaded a special power to let the revenues in whatever manner was thought proper. Notwithstanding which, the decision on this point, as on the mode of letting, is questionable, because at variance with [145] statute and precedent. The 3 Geo. IV. c. 91, contains no express provision, but recognises the practice of annually letting part of the revenue. In Mackenzie's time the rule was observed in practice,³ and it has been generally observed since.

Let of rents
of heritable
property.

Those parts of the revenue which consist of the rents of heritable property can be let for three years only. On this matter the provision of the Statute 1491 c. 36, is express, and it has been held to be operative.⁴ Although no express decision on the subject appears, yet where the question regarded the period for which the heritable property itself could be let, it was assumed by both parties that leases of the rents were subject to this limitation.⁵ It has been doubted whether such leases can be let "from three years to three years, for many three years, on one paper;" or if, on such obligations, the magistrates can be compelled to renew the leases, because if that were sustained the statute might be easily eluded.⁶ But it was decided that this nullity was not receivable *ope exceptionis*, especially if not pleaded by the burgh.⁷ And it has been said that leases so granted seem to be valid if restricted to three years.⁸ In more recent times leases of the rents of the heritable property of burghs appear to have been little known in practice, and there has not been discovered any modern decision concerning them.

¹ Mackenzie's Ob. 106. ² Bankt. ix. 19. Jack v. Town of Stirling, 1681, Mor. 1628, 2496.

³ Macchie v. Mag. of Edinburgh, 1735, Mor. 251; Sess. Pa. of Fol. Dic. p. 1193, *et seq.*, Adv. Lib.

⁴ Mackenzie's Ob. 106.

⁵ King v. Burgh of Aberdeen, 1491, Mor. 7863; 1 Craig, xv. 16; Mackenzie's

Ob. 106, 986; ² Bankt. iii. 73; ² Ersk. iii. 15.

⁶ Dean v. Mag. of Irvine, 1752, Mor. 2522-3.

⁷ Mackenzie's Ob. 106.

⁸ Earl of Galloway v. Burgesses of Wigton, 10 Feb. 1631, cited by Mackenzie's Ob. 106, Mor. 7193 and 7835.

⁹ Mackenzie's Ob. 106.

Anciently the Statute 1491, c. 36, seems (erroneously) to have 1491, c. 36 been so construed as to include not merely leases of the rents, but of the heritable property itself.¹ In a case cited by Balfour,² the statute was deemed to have barred leases of any part of the common good for more than three years; but this is contradicted by the statute itself, on which, embodying it, the decision expressly proceeds. This opinion does not appear to have prevailed in more modern times, as it is not expressed by Mackenzie in his Observations on the statute, nor mentioned by Stair.

There seems to have existed a practice by which leases beyond three years were sanctioned by the authority of the Convention of Royal Burghs.³ A lease for two nineteen years without that sanction was sustained by the plurality of the Court; and there was allowed afterwards a proof (before answer) of the value of the subjects, and of the custom of ratification by the Convention.⁴ At a subsequent period it was [146] said that burghs could not feu their lands without permission by the Convention;⁵ but leases for nineteen years were held to be valid, on the principle that the Act 1491, c. 36, was never intended to restrain magistrates from feuing or granting long leases of their lands; and if it ever had, that part of the statute was in desuetude.⁶ Subsequently the power of alienation having been explicitly recognised,⁷ and, by necessary consequence, that of granting leases of such duration as was requisite for the purposes of due administration, the power has not since been questioned; and by the 3 Geo. IV. c. 91, it is sanctioned upon compliance with the statutory rules.

Occasionally burghs have leased their common property for grassums,⁸ and they have the power of granting rental rights.⁹

By the Statutes 3 and 4 Will. IV. c. 77 (28th August 1833), Art. 5.—
and 4 and 5 Will. IV. c. 86 and 87 (15th August 1834), municipal *Powers of, and mode of letting by, Parliamentary burghs.* constitutions were conferred upon thirteen burghs not royal, but which, by the Act 2 and 3 Will. IV. c. 65 (15th July 1832), had acquired the right of electing members of Parliament. In none of the statutes relative to those burghs has any distinctive name been given to them, but in common parlance they were called

¹ Balfour 45, c. xiv., 1 Craig, xv. 15.

² The King v. Burgh of Aberdeen, 1491, Mor. 7863.

³ Mags. of Edinburgh v. Paterson, 1690, Mor. 2496. Hope's Min. Prac. t. ix. sect. 16, Note.

⁴ Mags. of Edinburgh v. Paterson, *ut sup.*

⁵ Hope's Min. Prac. *ut sup.*

⁶ Dean v. Magistrates of Irvine, *ut*

sup. Elch. Burgh-Royal, No. 33, 2 Bankt. ix. 18, 2 Ersk. iii. 15.

⁷ Macdowal v. Mags. of Glasgow, 1768, Mor. 2525.

⁸ *Vide* examples in p. 61 of Add. Pet. for W. Murray, in Earl of Wemyss v. Murray, 17 Nov. 1815, Fac. Coll. No. 2, p. 8.

⁹ Earl of Galloway v. Tailzifer, 1627, 1631, Mor. 7193-5.

"PARLIAMENTARY BURGHES," which name was afterwards incidentally sanctioned by the Legislature.

3 and 4 W.
IV. c. 77.

In them, as in royal burghs, the municipal administration is vested in the town-councillors chosen by the electors; and in so far as relates to administration, the constitution and powers are substantially the same as in burghs-royal. The councillors, by section seventeenth, elect the managers of charitable and other public institutions; and by section eighteenth, where any trust or management was vested in the existing magistrates and councils, the same powers are to belong to those elected under the provisions of the Act. Section twenty-first reserves to crafts, trades, and guildries, the right of electing their own office-bearers and managing their affairs. By section twenty-fifth the administration is devolved on managers where there is no legal council or magistracy. The thirtieth section bears that the magistrates and town council to be elected under the authority of the Act "shall have such and the like rights, powers, authorities, and jurisdiction, as is or are possessed by the magistrates and council of any [147] royal burgh in Scotland," under certain exceptions and restrictions relative to civil and criminal jurisdiction.

Whether
such burghs
are subject
to rules of 3
Geo. IV. c.
91?

The magistrates and council of the parliamentary burghs are thus vested with the same powers of administration as those of royal burghs. But it is a new and important question, whether they must be governed by the regulations of the 3d of Geo. IV. c. 91? There is no case in which this question has emerged; and while it is one of difficulty, it may rather be deemed that they could not be subjected to these regulations. The investment in the magistrates and council of parliamentary burghs of the same powers and authorities as those possessed by the functionaries of royal burghs, might appear to involve the construction that they were to have those powers under the same restrictions. This view may seem consonant with expediency and with ordinary inference; but it may be doubted if it is in accordance with the rules of statutory construction. The Statute 3 and 4 Will. IV. c. 77, neither by detailed provisions, nor by words, nor by inference, embodies either the 3 Geo. IV. c. 91, or any section of 3 and 4 Will. IV. c. 76, which, even by implication, recognises that statute. But a statute conferring powers is not, by implication, held to embody the enactments of a previous restraining statute. For, had the Legislature intended that it should, they would have made provision to that effect. If this view shall be considered sound, parliamentary burghs will, in administration, be governed by the rules of common law, the nature of which will be stated under the next article.

The magistrates of a BURGHE OF REGALITY have the same power with the magistrates of a royal burgh of granting feus of the common good,¹ and consequently of granting leases. But grants by these communities are governed by the rules of common law, because the statutory provisions relative to the powers of administration apply to royal burghs only. The office of chamberlain, and the rules enforced by him, included burghs-royal alone.² The Statute 1491, c. 36, and 1535, c. 26, relate solely to "our sovaine lorde's borrowes." The Act 1593, not embodying any terms of limitation, mentions generally "all borrowis within the realm." But as it refers to preceding statutes made relative to the "saidis borrowis," and as these include only burghs-royal, it is, by its purview [148] and intendment, confined to them. And the Statutes 1693, c. 28, and 3 Geo. IV. c. 91, are expressly limited to burghs-royal.

Art. 6.—
*Powers of,
and mode of
letting by,
Burghs of
Regality and
Barony.*

The statutes specially applicable to burghs of regality have no reference to the powers of administration. The Act 1606, c. 16, ratifies all Acts of Parliament and laws concerning the immunities and privileges of burghs-regal (of regality). The Statute 1698, c. 19 and 20, confers on burghs of regality and barony certain commercial privileges. The 20 Geo. II. c. 43 (the Jurisdiction Act), reserves (section twenty-six) in the same state as prior to that statute the jurisdiction of burghs of regality and barony dependent upon royal burghs; and reserves (section twenty-seven) the jurisdiction of those which at the date of the statute were independent of the Lords of Regality or Barons; and the Statute 35 Geo. III. c. 122, authorises the sovereign to erect free and independent burghs of barony on those parts of the sea-coast on which the fisheries are carried on, in the manner usually practised before the Statute 20 Geo. II. c. 43. None of the statutes contain any provisions regulating the administration of property of those communities. The twenty-sixth section of the 20 Geo. II. c. 43, has been held to have preserved entire the jurisdiction of burghs of regality and barony dependent upon burghs-royal.³ But there is no authority for holding that property belonging to the royal burghs, as Lords of Regality or as Barons, is to be administered in terms of the statutes governing that of the royal burghs themselves.

Statutes as
to Burghs
of Regality.

¹ *Cathie v. Mags. of Musselburgh*, 1752, Mor. 2521, Elch. Burgh-Royal, No. 52. *Mags. of Kilmarnock v. Inhabitants*, 1776, Hailes 738, 5 Br. Sup. 406.

² *It. Cam. Reg. Maj. 162, et seq.*; *Balfour* 876, c. 1; 4 *Stair*, i. 3; 4 *Bankt.* xx. 10; 1 *Ersk.* iv. 38.

³ *Proc.-Fisc. of Gorbals v. Macarthur*, 1775, Mor. 7381, 5 Br. Sup. 494. *Begbie v. Brown*, 1776, Mor. 7709. *Douglas v. Dowie*, 30 May 1817, *Fac. Coll.* No. 118, p. 348; *aff.* 27 March 1822, 1 S. App. 125.

Leases by
such burghs
subject to
rules of
common
law.

As burghs of regality and barony are corporations consisting of the inhabitants of a determinate tract of ground within the barony, and subjected to the government of magistrates,¹ and as they are "corporations, and manage their own concerns,"² they must, although not subject to regulations strictly defined, manage their property according to the rules of good administration. Where a question (to be noticed hereafter) arose relative to a particular act of alienation, this principle was conceded by the magistrates of a burgh or barony.³ The magistrates of a burgh of barony possessed of very extensive privileges were found not to be entitled to displace the superiority of the burgh in liferent. Throughout it was conceded that the magistrates were bound to exercise a prudent administration and judicious management of the common good; and it was held that, being only trustees for the community, they were bound to use the power of alienation only for the good of the burgh, and that an act which was not a judicious exercise of power was [149] invalid.⁴ The same rule necessarily applies to leases of the revenues or property of such communities.

Let should
be preceded
by Act of
Council.

Conformably to a practical rule formerly stated,⁵ it will be prudent for a lessee to obtain a previous act of council. But it cannot be affirmed that such a warrant is indispensable. In a case already cited,⁶ the opinions delivered are applicable to burghs generally; but the special matter having relation to a royal burgh, the *dicta* do not necessarily include other burghs, although by analogy the rule would probably be extended to them. Reduction on the ground of the want of a proper consideration would succeed on the principle. But that case cannot be deemed decisive, because, although the want of roup was pleaded, it did not form the gist; and the matters mainly urged were the adequacy or inadequacy of the price and the general *bona* or *mala fides* of the transaction. In a subsequent case the point was made;⁷ but as the transaction was in itself held to be invalid, it was not necessary

¹ 1 Ersk. iv. 30.

² 2 Bankt. iii. 76.

³ Wilson v. Storry and Maga. of Paisley, 1776, Mor. 2529.

⁴ Stewart v. Maga. of Paisley, 22 Jan. 1822, Fac. Coll. No. 148, p. 504.

⁵ *Vide sup.* secs. iii. and v. of this chapter.

⁶ Maga. of Selkirk v. Clapperton, 11 June 1823, F.C. 994, 6 S. 955.

⁷ Stewart v. Maga. of Paisley, *ut sup.* The pursuers, supporting the necessity of a public roup, relied, 1st, on Wilsons v. Wilson, 1789, Mor. 16,376, in which it was decided that a tutor obtaining

in his own name a lease of lands formerly held by his pupils, is accountable to them for the profits; and 2d, upon the York Buildings Co. v. Mackenzie, 1793, Mor. 13,367, in which, as reversed upon appeal, it was decided that the common agent in a ranking is disqualified from purchasing at the judicial sale carried on under his direction. One point there made was, that it was his duty to bring the property to a public sale. The defenders (Stewart and others), against the necessity of a public roup, relied upon Wilson v. Storry, *ut sup.*

to determine the subordinate matter relative to the mode of transacting.

The right of any burgess to challenge the alienation of the heritable property of a burgh of barony on the ground of maladministration was sustained.¹ But, on the analogy of royal burghs, that right is now questionable, unless the acts of maladministration affect the private or patrimonial rights of the burgesses.²

There are numerous other corporations constituted for com-
mercial, charitable, and other purposes, and governed by various
rules, which, as they possess property, are occasionally lessors. Art. 7.—
Subordinate
civic, and
other cor-
porations.
They are constituted by statute, royal charter, or seal of cause.
In granting deeds they act by their constitutional organs, as
special officers, trustees, or committee of directors.³ Corporations
by seal of cause are subordinate civic bodies, created by burghs
which generally [150] possess that power of creation.⁴ The box-
master of such a corporation can discharge only the rents payable
during his incumbency, and not future rents, without an express
order from the body;⁵ and therefore without that warrant he
could not exercise the power of granting leases.

Corporations, it has been held, may exist by prescription or
long usage alone, without creation by statute, charter, or seal of
cause.⁶ But as the decision is not free from doubt, especially
since a recent judgment of the House of Lords,⁷ a lessee (of a
subject belonging to a body whose corporate character is doubtful)
ought in prudence to procure, for the warrant of his lease, a
document proceeding upon the authority of all the members, or of
as many as possible.

SECTION VI.—PUBLIC TRUSTS.

While there are numerous trusts resembling corporations, for
public purposes only, but constituted by special statutes, there are
others of a general nature, either created by statute or existing at
Common Law.

¹ *Wilson v. Storry, ut sup.*

² *Burgesses v. Mags. of Inverary*, 14 Dec. 1820, F.C. 218.

³ 1 Bankt. ii. 18, 19. 1 *Ersk. vii. 64*, Note (by Ivory), 260.

⁴ 1 *Ersk. vii. 64*.

⁵ *Hammermen of Edinburgh v. Stewart*, 1864, Mor. 2641.

⁶ 1 *Ersk. vii. 64*, Note 260. *Maltmen of Glasgow v. Tennent*, 1749, Elch. (Prescription), No. 30. *Feuars of Kelso*

v. D. of Roxburghe, 1755, Mor. 1830.

Wrights of Glasgow v. Crose, 1765, Mor. 1962. *Begbie and Gibson v.*

Brown, Jan. 1776, Mor. 7709. *Skirving v. Smellie*, 1803, Mor. 10,921.

Gray v. Guildry of Arbroath, 16 Jan. 1823, 2 S. 123. *Writers to the Signet v. Grahame*, 13 Feb. 1823, 2 S. 214.

⁷ *Graham v. Office-Bearers of Writers to the Signet*, 21 June 1825, 1 W. and S. 539.

Art. 1.—
Friendly,
Industrial,
and build-
ing societies.
Friendly
Societies
Act of 1875.

(1) FRIENDLY SOCIETIES.—[The 38 and 39 Vict. c. 60, repeals all the previous statutes relative to friendly societies, so that from 1st January 1876 it is now the only statute, but the repeal does not, by section second, affect societies registered or certified under the Acts repealed, which are to be deemed societies registered under this Act (§§ 2, 5, 6.)

[Section 16 (sub-sec. 2) enacts that “a society, or any branch of a society, may (if the rules thereof so provide) purchase or take on lease in the names of the trustees for the time being of such society or branch, in every county where it has an office, any land, and may sell, exchange, mortgage, lease, and build upon the same, . . . and no purchaser, assignee, mortgagee, or tenant shall be bound to inquire as to the authority for any sale, exchange, mortgage, or lease by the trustees, and the receipt of the trustees shall be a discharge for all moneys arising from or in connection with such sale, exchange, mortgage, or lease; and for the purpose of this section no branch of a registered society need be separately registered: Provided that nothing herein contained shall enable any benevolent society to hold land exceeding one acre in extent at any one time.”

[Friendly Societies therefore may either take or grant leases or sub-leases, acting in either case in the name of their trustees, in whom all their property is vested.]

(2) INDUSTRIAL SOCIETIES.¹—[Industrial and provident societies may be formed, with limited liability, for the purpose of carrying on any labour, trade, or handicraft, whether wholesale or retail, except banking, and of applying the proceeds for any purposes allowed by the Friendly Societies Acts or otherwise permitted by law. These societies are now regulated by the Acts 25 and 26 Vict. c. 87, and 30 and 31 Vict. c. 117, all previous Acts on the subject being repealed. The certificate of registration constitutes the members of such societies into a corporate body, “with power to purchase, erect, and sell and convey, or to hold lands and buildings.”² By an explanatory Act passed in 1871,³ it is provided that the rules of any such society may provide from time to time, *inter alia*, “for the management, laying out, leasing and subleasing, (whether at rackrent on building, mining, quarrying, or improving leases or otherwise howsoever, and whether to members of the society or other persons)” “of any lands or buildings for the time being held by the society;” “and for the appropriation of the rents

¹ [The previous edition contained a brief account of the Industrial and Provident Societies Act, 1863, and Amending Acts (15 Vict. c. 31, and 17 Vict. c. 26), which, with a subsequent statute of 18 and 19 Vict., have been repealed.]

² [30 and 31 Vict. c. 117, § 4.]

³ [34 and 35 Vict. c. 80, § 1.]

to be received in respect of any such lands or buildings. Although the powers of leasing are of a very wide description, it is chiefly building purposes that such societies are formed, and probably only one or two as yet exist in Scotland. The Act refers to the rules for provisions as to the mode of granting leases; and lessees ought to ascertain in every case on whom the power is conferred of contracting for and executing leases of the society's lands and buildings. In general that power will be vested in the managing committee or directors, and the resolution authorising the tack should be recited or referred to.]

(3) BUILDING SOCIETIES.—[The Building Societies Act, 1874, enacts (§ 37) that such a society may hire or take upon lease any building for conducting its business, and may hold upon lease any land for the purpose only of erecting thereon a building for conducting the business of the society, and may let such building or any part thereof. Building societies receiving a certificate of incorporation under this Act are lessors or lessees in their corporate name.][152] This statute does not authorise or contemplate the formation of a joint-stock society for the purpose of erecting or purchasing houses to be let and the rents shared among the members, but for the purpose of affording the means of enabling each member individually to acquire such property.

Building Societies.
37 and 38
Vict. c. 42.

By the General Road Act for Scotland, 4 Geo. IV. c. 49 (4th July 1823), continued by 1 and 2 Will. IV. c. 6 (30th July 1831), the road trustees of the different counties are empowered to grant leases of the tolls. The eighth section confers upon the majority the right of exercising "all the powers and authorities" vested in them by the statute, and the tenth authorises a division of the roads into districts. The fifty-fourth comprises the details relative to letting the tolls. *First*, they must be let at a meeting of the trustees; *second*, the mode of letting shall be, in the first instance, by public roup; but *third*, if they cannot be so let, private tender is declared lawful; *fourth*, the duration shall not exceed three years; and *fifth*, the trustees themselves may bid. Although the tolls be advertised to be let by the general trustees, the leases may be granted by the district trustees or even by their convener; but where the convener of the district trustees granted a lease, the general trustees were held to be so far the lessors as to be liable, conjunctly with those for the district, for damages incurred by eviction.¹

Art. 2.—
Road
Trustees.

Property is sometimes vested for religious purposes in the trustees of communities of dissenters. As the right is of an ano-

Art. 3.—
Religious
Communi-
ties.

¹ Fairlie v. Gibson, 22 May 1829, 7 S. 637.

malous kind, an intending lessee ought to be careful in assuring himself of the validity of the title of the lessors. These communities (with a statutory exception or modification to be immediately noticed) are not corporations known in law, but they are tolerated under the operation of the Statutes 1690, c. 5 and 27, and 1710, c. 7, and are entitled to hold property. But they in so far resemble corporations that there exists a body capable of perpetual succession so long as there remain any who adhere to the religious principles of the [153] institutors.¹

Voluntary
associations.

Originally it was decided that, not being bodies-corporate, they could not hold property either by themselves or trustees.² Their right to hold by trustees was afterwards recognised, and was decided to be for the behoof of the majority of the contributors.³ But subsequently the right was found to exist for behoof of a society of contributors forming, by themselves or others with them, a congregation of a particular denomination.⁴ On a remit from the House of Lords,⁵ the Court pronounced a judgment the same in substance, which upon appeal was affirmed on the ground that where it was difficult to ascertain who were the legal owners as representatives of the contributors, the property belonged to those who adhered to the religious principles of the persons by whom it was acquired.⁶

13 Vict. c.
13.
(Sec. 1.)

A recent statute has placed religious communities in a position somewhat different as to one special effect from that which they formerly occupied with relation to property. It bears that wherever heritable property consisting of lands or houses, in Scotland, has been or may be hereafter acquired by any congregation, or society, or body of men associated for religious purposes, or for the promotion of education, as a chapel or other place of worship, or as a dwelling-house for the minister of such congregation, or for other purposes specially named and enumerated, and wherever the charter, disposition, or conveyance of such heritable property has been or may be taken in favour of the minister, kirk-session, or other enumerated office-bearers, or of trustees, or of parties named in the deeds of conveyance, or of the individuals composing the corporation or society—the feudal conveyance followed by infeftment, or the lease, shall vest the parties named and their successors in office in full right to the property. The rights conferred by this statute are, by the specification and enumeration, limited to pro-

¹ 1 Ersk. vii. 64, note *.

² *Wilson v. Bryson*, 1762, 5 Br. Sup. 798. *Elchies*, Title to Pursue, No. 1. *Pollock v. Wilson*, 1762, Elch. 46. No. 2. *More's Notes*, ciii.

³ *Wilson v. Jobson*, 1771, Mor. 14,555, 16,132, Hailes 482. *Allan v. Macrae*,

1791, Mor. 14,583. *Dunn v. Brunton*, 1801, Mor. App. Society, 3.

⁴ *Davidson v. Aikman*, 1806, Mor. 14,584.

⁵ *Craigdallie v. Aikman*, 5 Feb. 1813, 1 Dow 1.

⁶ *Craigdallie v. Aikman*, 1820, 2 Bligh 529. [5 Pat. 719, 6 Pat. 618.]

perty acquired for the special purposes named and enumerated, and [it] does not comprehend property applied to any other purpose, although connected with the general objects of the religious body. The [154] statute therefore cannot be deemed to have affected the ordinary powers and rights of such bodies, which continue as they were under the common law.

SECTION VII.—ADMINISTRATORS PARTLY PUBLIC AND PARTLY PRIVATE. ASSOCIATIONS UNDER DWELLING-HOUSES ACT.

The Statute 18 and 19 Vict. c. 88 (14th August 1855), is entitled "An Act to facilitate the Erection of Dwelling-Houses for the Working-Classes in Scotland." Where (sec. one) four or more persons, "associating" for the purpose of erecting new, or improving existing dwelling-houses, for the working-classes in Scotland, shall have subscribed the requisite capital and framed the contract of copartnery containing provisions for the management of the affairs of the association and rules "for the upholding and occupation of the houses, and for letting and granting tacks of the same," they are empowered to present a petition, vouched by plans and specifications and an estimate, to the Sheriff, and in certain burghs to the Dean of Guild, who if satisfied (sec. second) shall grant a warrant for the erection or improvement of the houses, and of the registration of the contract. The fourth, fifth, sixth, seventh, ninth, and tenth sections, contain provisions relative to inspection, title, dealing with the superior, transfers of shares and similar details; and the eighth section enacts that the registered rules shall be "real burdens on and affecting the said houses and other subjects of the association," and that they may be enforced by summary process against any owner or occupant by any other, by the association, or by the Procurator-fiscal.

Provision is made (sec. eleventh) that the buildings shall permanently be held and let by the association without grassums, and for periods not exceeding twenty-one years, or that the association shall have power, after public notice, to "dispone to individuals in tack or rental rights" separate lots of the dwelling-houses for a grassum or price to be paid together with a yearly tack-duty equal to the feu-duty or ground-annual payable to the superior, with a certain addition and a duplication for the year when a duplicand is due.

By sections twelfth and thirteenth, provision is made for the formation of a "register or rental book," in which all tacks and rights are to be entered, according to scheduled form and specified

tutors must govern themselves by the rules of sound administration. [The Court therefore has authorised tutors-nominate to let for nineteen years to a previous tenant after a judicial valuation, but without advertising the farm.]¹ They cannot in the ordinary case let for a rent lower than that previously obtained.² When the former rent cannot be privately obtained, the lands ought to be let by auction, and a lower rent may then be taken.³ Grassums, anticipation of rent, and similar transactions are inadmissible, because extraordinary. Nor can rental rights be originally granted by tutors, but they may be renewed by them, for the renewal is an act of lawful administration,⁴ or at least is much more accordant with that character than would be the expulsion of the rentaller.⁵

Art. 2.—
Curators.

[161] Leases by a minor are properly his own deeds, executed with the consent of his curator.⁶ And a minor who was *majorennitatis proximus*, with consent of a curator who was not *sine quo non*, was held entitled to grant a lease, although the curator who was *sine quo non* was adverse to the grant, as he had given a "tack of tolerance" to another tenant.⁷

Opinions of
writers.

Craig denies to curators, as he does to tutors, the power of leasing at all, or at least of stipulating for a duration exceeding that of their offices.⁸ Stair recites the doctrine of Craig as embodying the latter limitation, but gives no opinion of his own.⁹ Bankton (allowing one year after expiration of office)¹⁰ and Erskine¹¹ explicitly hold the duration of the lease to be commensurate with that of the office. But the former cites no authority, and the *dictum* of the latter is expressly founded upon a decision involving the leasing powers, not of a curator, but of a tutor,¹² and which therefore does not warrant the *dictum*. The doctrine is as irreconcilable with principle as it is adverse to practice. That a minor with consent of his curator can grant deeds alienating his heritage, subject to reduction upon proof of lesion, is laid down

¹ [Brown's Tutors, 16 July 1867, 5 Macph. 1046.]

² 2 Craig, x. 1; 2 Stair, ix. 3; 6 Wall. vi. 444; 1 Ersk. vii. 16.

³ 6 Wall. vi. 444, 1 Ersk. vii. 17. [This is not now the practice, but on evidence of necessity being produced, the Court will grant authority to let at a lower rent. Fraser, Par. and Ch. 258-502, and *infra*, p. 177.]

⁴ 2 Stair ix. 17, 2 Bank. ix. 41.

⁵ Stair, *ut sup.*

⁶ Stair, vi. 35, Note a (by Brodie), and 1 Mackenzie Inst. vii. 8. 1 Ersk. vii. 14.

⁷ L. Niddrie v. Murray, 1670, 1 B. S. 616.

⁸ 2 Craig, x. 1.

⁹ 2 Stair, ix. 3.

¹⁰ 2 Bankt. ix. 18.

¹¹ 1 Ersk. vii. 16.

¹² A. v. M. of Huntly, *ut sup.*, 1 Ersk. vii. 16, Note; and 1 Bell on Leases, 109.

in the Books,¹ and is sanctioned by the decisions.² *A fortiori* therefore he can grant a lease to endure not only until he attain majority, but for whatever period shall be deemed proper. In consequence, the rule now received is, that a lease by a minor with consent of his curator will be valid, not only during the curatory, but during its whole term, subject to restitution, if enorm lesion shall be proved.³

And so it has been decided. A lease having been granted for nineteen years by a minor of the age of nineteen, in a process of reduction it was pleaded that a lease by a minor and his curators is good for the period of the minority and guardianship only. But the lease was held to be good for its whole term, on the principle that he is owner of the land, and that the law acknowledges him as a person who has a will of his own, and who is entitled to administer his property according to his own pleasure, provided only he have his guardian along with him to guide his inexperience and supply the immaturity of his judgment.⁴ The [162] ordinary period of nineteen years has been suggested as that for which such a lease can certainly be granted.⁵ Although this limitation, previously to the recent enabling statutes, must have been operative under an entail, there is no maxim or reason for applying it to estates in fee-simple.

As the lease is the deed of the minor himself, it is as invalid, if devoid of his signature, as if devoid of the consent of his curator.⁶ If the minor decline to execute the lease, the transaction must be terminated, because there is no mode by which he can either be compelled to act, or by which his curator can be authorised to act independently. An application to the Court of Session to compel a minor to concur with his curators was refused upon the special matter without an explicit decision upon the abstract question.⁷ But the "general opinion" of the Court being that they possessed no *compulsitor*, the case has been viewed as equivalent to a refusal to interpose.⁸ Nor is there any one authority for impugning this construction. Should the minor be "absent and furth of the realme," it was held by an old decision that the curator might levy

¹ 1 Craig, xii. 30. 1 Stair, vi. 44. 1 Bankt. vii. 52. 6 Wallace, xi. 509-10. 1 Ersk. vii. 17, 33, 34. 1 Bell's Com. 134.

² Hamilton v. Sharp, 1630, Mor. 8981. Thomson v. Stevenson, 1666, Mor. 8982-3. Clerk's Cra. v. Gordon, 1699, Mor. 2668.

³ 1 Bell's Com. 134. Bell's Pr. 2096. 1 Ersk. vii. 16, Note.

⁴ Alexander v. Thomson, 1613, Hume, 411.

⁵ 1 Bell on Leases, 109.

⁶ 1 Stair, vi. 36. 1 Mackenzie Inst. vii. 8. 6 Wall. xi. 512. 1 Ersk. vii. 14. Macintosh v. Fraser, 1676, Mor. 11,239. E. Bute v. M'Kenzie, 1725, Mor. 16,336.

⁷ L. Drumore, &c., Petra, 1744, Mor. 16,349 and 8930.

⁸ Note a (by Brodie) to 1 Stair, vi. 35.

his rents.¹ The principle which governed that decision was obviously that of necessary administration; and upon that principle, combined with the analogy of the Act of Sederunt of 13th February 1730, it may be deemed that curators so situated have the power of granting leases to subsist during their offices. But there is no express authority, nor, except in very special cases, will the position practically emerge.

Lease by
minor to
curator.

Or father.

While, in consequence of a comparatively recent decision,² it cannot positively be affirmed to be fixed law that a lease by a minor in favour of his curator is null, its validity is very doubtful. In the Books the doctrine of invalidity is laid down,³ but the pure question has not hitherto been determined. In one case, where a deed by a minor in favour of his curator was sustained, there was contained in it a power to alter; and it was combined with an effective deed, to which the objection did not apply.⁴ More recently minors, with consent of their father as administrator-in-law, having granted a lease in favour of their father and of his copartner for behoof of a company, the objection of nullity having been pleaded in the form [163] of a suspension and interdict to bar possession, the Court, in order to try the question, passed the bill, but refused the interdict.⁵ The point now under consideration was there made, but as no farther discussion appears to have taken place, the case does not form a precedent. Nor can it be inferred that because the interdict was refused, the Court was inclined to sustain the validity of the lease, for the lease being in favour of a company, the interests of others were involved, with which it might not be deemed right summarily to interfere by granting an interdict against possession. But, on principle, united with the series of *dicta* contained in the Books, the objection of invalidity may be deemed to have been good.⁶

There exists no restraint upon curators with relation to the mode of leasing or to the stipulations. A lease of a whole estate as one farm and conversion of profits in kind at the ordinary rate of the district were sustained, subject, necessarily, to restitution upon evidence of lesion.⁷

The powers of leasing vested in the curators of insane or

¹ Crichton v. Crichton, 1560, Mor. 16,228.

² Gillespie v. Clark, 1821, 1 S. 160.

³ Balfour 124, c. xii. Bankt. vii. 57.

⁴ Wallace, xi. 509. 1 Ersk. vii. 19.

⁵ Macneill v. Macneill, 1864, Mor. 16,229; Balfour 124, c. xii. Maister of Caithness v. E. of Caithness, 1616, Mor. 16,229; Balfour *ut sup.* Craich v. Napier, 1729, Mor. 16,342.

⁶ Gillespie v. Clark, *ut sup.*

⁷ [On this subject comp. Fraser, Par. and Child, 372. Macgibbon v. Macgibbon, 5 March 1852, 14 D. 605; Manuel v. Manuel, 16 Jan. 1853, 15 D. 284.]

⁸ Munro v. Munro, 1735, Elch. (Minor), No. 1.

fatuous persons being as limited as those of tutors, they can grant leases of a duration only equal to that of their office.¹ The duration of leases by them must therefore be always indefinite, if not in terms, at least in reality, as their subsistence must be dependent upon the survivance and mental condition of the proprietor.

The Court of Session appoints administrators "on the Art. 2.—
estates of pupils not having tutors, and of persons absent who ^{Judicial}
have not sufficiently empowered persons to act for them, or who ^{factors.}
are under some incapacity for the time to manage their own estates, to the end that the estates of such pupils or persons may not suffer in the meantime, but be preserved for their behoof, and of all having interest therein."² There may also be included heirs deliberating whether they will enter.³ When appointed to manage the estates [164] of pupils, the administrator is called "*Factor loco tutoris*;" when the proprietor is absent, "*Factor loco absentis*;" and when he is incapable of management, "*Curator bonis*." But, occasionally, the term "*Curator bonis*" is applied to them indiscriminately.⁴ Their general powers of administering property are nearly the same with those of a tutor.⁵

But the Act of Sederunt of 13th February 1730, by a special Act of
provision, regulates the duration of leases granted by them. By ^{Sederunt,}
section eighth it is enacted, "That such factor shall have power to ^{13 Feb.}
grant tacks or leases to continue during all the time that the ^{1730.}
estate set in tack shall remain under the inspection of the said Lords of Session, and for one year further."⁶ In the other details of leasing they are governed by the rules applicable to factors upon estates under sequestration.⁷ First, All the powers which

¹ 1 Bankt. vii. 14; 6 Wallace xvii. 579; 1 Ersk. vii. 16, Note; 1 Bell's Com. 136; 1 Stair vi. 25, Note s (by Brodie). Lord Beay v. Anderson, 1800, Mor. 16,385. The Statute 15 and 16 Vict. c. 48 (30th June 1852), being "An Act for the Amendment of the Laws respecting the Property of Lunatics," has been embodied in the collection of public general statutes affecting Scotland. One section of it, the sixth, has relation to Scotland; but the Author has satisfied himself that it is purely an English statute, by reason both of its phraseology and machinery, and of the two statutes 10 Geo. IV. and 1 Will. IV. c. 65, and 8 and 9 Vict. c. 100, which it amends, and which are certainly both English statutes.

² Preamble to Act of Sederunt of 13th Feb. 1730—Acts of Sed. p. 293; 1 Bankt. vii. 71-2, and 2, xi. 18; 6 Wallace, xiv. 521; 1 Ersk. vii. 10, and 2, xii. 58; 1 Stair vi. 10, Note s (by Brodie).

³ 2 Ersk. xii. 58.

⁴ 1 Bankt. vii. 71-2.

⁵ Note (by Ivory) 198, to 1 Ersk. vii. 10; Note s (by Brodie) to 1 Stair, vi. 10. Falconer v. Thomson, 1793, Mor. 16,380. Robertson v. Elphinstone, 28 May 1814, F.C. No. 181, p. 631. Lumadaine v. Balfour, 15 May 1827, F.C. No. 78, p. 473.

⁶ Acts of Sed. p. 295; 1 Bankt. vii. 29 and 71; 6 Wall. xiv. 524; 1 Ersk. vii. 10, and Note (by Ivory) 198, and 2, xii. 58.

⁷ 1 Bankt. vii. 71-2.

belong to a proprietor in feft may be exercised by them in removing tenants whose leases are expired, and of granting new leases with proper stipulations.¹ The rule formerly was to let by public auction, even when the same or a higher rent was contemplated;² but letting privately is now held to be admissible, unless a diminution of the actual rent be contemplated. *Second*, With leases, although deemed to be contrary to an entail, the factor cannot interfere, for he has no authority to pursue an action of reduction and removing upon that ground.³ *Third*, Where the lands are let at a reasonable rent, at which the tenant is willing to continue, he must be allowed to continue from year to year, unless there be good reason to believe that at a public auction a rent would be obtained so much higher as to compensate the additional expense.⁴ *Fourth*, A new lease cannot be granted during the currency of the former.⁵

Factor on
sequestrated
estates.

While a competition for property is pending, the subject-matter is committed to the management of a judicial factor.⁶ In leasing, the powers and duties are the same with those of the other classes of judicial administrators already described, except that, not having been included under the Act of Sederunt of 17th February 1730, it may be deemed that they can grant leases to last only during their office, and not for a year after its termination.⁷

SECTION III.—PUPILS PROTECTION ACT, 12 AND 13 VICT. c. 51 (28TH JULY 1849).

[165] An important statute has recently been passed "for the better Protection of the Property of Pupils, Absent Persons, and Persons under Mental Incapacity." The preamble proceeds on the Act of Sederunt of 1730, bears that the existing regulations and the means of enforcing them are imperfect and insufficient, and that in consequence great loss has resulted. The interpretation clause sets forth that the expression "Judicial Factor" or "Factor," shall mean *Factor loco tutoris*, *Factor loco absentis*, and *Curator bonis*. By the seventh section it is enacted that if at any time it shall appear to the factor that there is a strong expediency for renewing or granting a lease for a period of years, he shall report the same

¹ 2 Bell's Com. 264-5. Thomson v. Elderson, 1767, Mor. 4070. Carlyle v. Lowther, 1766, Mor. 6380.

² 4 Mair xli. 7, li. 27, 28.

³ 3 Bell's Com. 264, and Whitson v. Hannay & Co., 21 Feb. 1807, there cited.

⁴ 2 Bell's Com. 265. Edgar v. Whiteheads, 1714, Mor. 4053.

⁵ Carlyle v. Lowther, *ut sup.*

⁶ 4 Stair xli. 7, li. 27, 28; 1 Bankt. xv. 15, 16; 2 Ersk. xii. 55, 57.

⁷ [See Morrison, 11 Dec. 1857, 20 D. 276; *infra* p. 183]

to the Accountant of the Court of Session (created by section ninth) who may order any necessary enquiry, and shall state his opinion in writing. The report and opinion may be submitted by the factor to the Lord Ordinary, with a note praying for the sanction of the Court to the measure proposed. The Lord Ordinary shall, with or without further enquiry, report the matter to the Court, who, if they consider it expedient with due regard to the amount of the estate at the time, may sanction the measure, and the decision of the Court shall be final and not subject to appeal. Entailed estates are included.

Special power to let may be obtained.

There are several decisions relative to the construction of this Act. From the differences of opinion of the Judges in these cases, both in each Division of the Court and between the two Divisions, serious practical difficulties may arise, and it would be well that the whole Court should deliberate and decide on the doctrines and the rules of law which are to govern. As the Act shews, there are three classes of administrators to which it applies, *Factors loco tutoris*, *Factors loco absentis*, and *Curators bonis*. The decisions are the following :—

Construction of Act.

First, A judicial factor was appointed on the estate of an aged person, both deaf and blind, and unable to manage his own affairs. It was held that as such a factor is not within the classes mentioned in the statute, the application did not come under the operation of the Act.¹

Factor to old deaf and dumb person.

Second, A tutor-at-law applied for special powers to grant a lease of a colliery for fourteen years, and the Accountant-General reported in favour of granting it, but the Court refused to grant power.² In the report the *ratio* of the [166] refusal does not appear with certainty. In a subsequent case it was said³ that one construction of the expressions used might be that the Judges doubted the powers of the Court to grant the application, and another construction might be that they would look with greater jealousy on tutors-at-law than others. But, in a still subsequent case,⁴ it was explained that the difficulty was not as to the competency, but as to the propriety of granting special powers to tutors-at-law.

Tutor-at-law.

Third, In a special case powers were given to a curator to grant leases of small possessions for periods of nineteen years. An application was made under the 12 and 13 Vict. c. 51, and so involved a report from the Accountant-General, which bore that

Small possessions.

¹ *Acct. of Court v. Morrison*, 21 Feb. 1857, 19 D. 504, 29 Jur. 241, (as *Wilson*, Pet.)

² *Kincaid*, Pet., 8 July 1856, 18 D. 1208, 28 Jur. 611, *per* McNeill, L.P.

³ *Waddell*, Pet., 19 Feb. 1851, 13 D., 23 Jur. 289.

⁴ *Fraser*, Pet., 9 June 1857, 19 D. 801, 29 Jur. 367, *per* Hope, L. J.-C.

the possessions were so numerous, and that such constant changes would occur, that the most beneficial course would be to give general powers adapted to the exigencies. After information as to details, the Court granted special powers in regard to small possessions, the yearly rent of which did not exceed a certain amount. The letting was to be advertised, and the duration of the leases was not to exceed nineteen years.¹ The Court here deemed that it was both competent and proper to grant the powers craved. The necessity or expediency must in each case be the measure of the propriety.

Tutor-at-law.

Fourth, A tutor-at-law applied for special powers to grant a lease which would be binding beyond the subsistence of his office. There was evidence that the lease would be beneficial, and the Accountant-General reported that the powers craved might be granted. They were granted,² and thus the decision may be deemed to embody the general doctrine that the Pupils Protection Act sanctions the granting of leases by a tutor-at-law for a period beyond the subsistence of his office. As already indicated under the immediately preceding case, the competency of granting the powers was well considered, and there appears to have been no doubt entertained as to the propriety.

Tutor-at-law—Breaks.

Fifth, A tutor-at-law applied under the Pupils Protection Act for special powers to grant leases of eighteen years and a-half with a break at the end of five and a-half and of eleven years of other subjects. The report, first of the Accountant-General, and then that of a man of skill, were favourable. The Court having discussed the question of competency and explained, as already mentioned, the true ground of their difference with their brethren, held unanimously that it is competent under the Pupils Protection Act to grant special leasing powers to tutors-at-law, and by a majority³ that these powers shall only be [167] granted on a case of necessity being shewn. In the actual circumstances the majority of the Court refused to grant the special powers, as the leases would endure beyond the period of the eldest pupil attaining minority, and as no case of necessity had been shewn, the chief *ratio* appears to have been the absence of necessity.

¹ Lindsay, Pet., 13 Dec. 1855, 18 D. 205.

² Kincaid, Pet., *ut sup.*

³ Fraser, Pet., *ut sup.*; Lord Cowan dissenting, so the marginal abstract bears. As reported, Lord Cowan's words were, "It seems to me that the Pupils Protection Act puts the two" (a tutor-at-law and a judicial factor) "upon the

same footing, so far as applications for special powers to this Court are concerned. I consider that, in disposing of and judging of such applications, we should act on the same principles, whether the application be by a judicial factor or by a tutor-at-law." From the judgment of refusal, under the actual circumstances, Lord Cowan dissented.

Siath, Special powers were, after the usual proceedings under the Pupils Protection Act, granted to a factor *loco tutoris* of a pupil *pro indiviso* proprietor of heritable subjects, to grant leases to endure until the term next after the date when the pupil attained minority. In one of the leases the proposed lessee was the other *pro indiviso* proprietor.¹ *Pro indiviso owner.*

SECTION IV.—EXTRAORDINARY POWERS GRANTED BY THE COURT OF SESSION.

When, for the benefit of the property under their management, it is necessary that legal administrators should do extraordinary acts relating to leasing, extraordinary powers are, as formerly stated, conferred by the Court of Session. Although not limited by strict or definite rules, there are certain lines, marked out by principle and sanctioned by authority and practice, within which the Court confines itself in granting those powers.

The Court will not interpose its authority to such acts as must be done in the course of ordinary administration, and which are therefore within the strict and peculiar duty of a tutor, curator, or judicial factor. For, while it is not within its province to superintend every common step taken respecting an estate under guardianship or judicial management, its interference would be attended with detrimental consequences, as it might tend to relieve the administrator of the wholesome responsibility under which he is placed, and without the Court having an opportunity of knowing the extent of the adverse interest.² In consequence, a great dislike [168] has been expressed to interpose at all with relation to leasing;³ and it has been said that of late it has been the wise policy of the Court to interfere as little as possible with the management of funds entrusted to the factors appointed by them.⁴ The general doctrine has been explicitly recognised as in force, that if no special circumstances are stated, the Court, in appointing, will grant only the usual powers, leaving the tutor or judicial

Art. 1.—
Authority to
do acts of
ordinary
administra-
tion will be
refused.

¹ Fotheringham, Pet., 10 July 1857, 19 D. 964., 29 Jur. 452. [Power granted to a factor to grant a lease for one year to commence from the following Whitsunday, which was three weeks after his ward would attain majority. Pearson, 6 June 1865, 3 Macph. 883.]
² 2 Bell's Com. 265. *Per Curiam* in Home, Pet., 1793, Mor. 16,382. Henderson, Pet., Jan. 1803, Mor. 14,982.

Ross v. Ross, 9 March 1820, F.C. No. 33, p. 126. 1 Ersk. vii. 17, Note (by Ivory) §12. 1 Bell's Com. 133.

³ *Per* Lord Newton *sen.* in Beatson, Pet. 24 Feb. 1810, F.C. No. 200, p. 607.

⁴ *Per* Lord Craigie in Robertson v. Elphinston, 28 May 1814, F.C. No. 181 p. 331.

factor to apply for special powers if needed. But, as will immediately appear, those special powers have been granted with more frequency and readiness during the last few years than previously they had been.¹

Decisions.

Conformably to those principles the Court, *first*, refused to authorise a *curator bonis* (appointed upon the lapse of a trust), to grant leases in terms of the missives of the former proprietors.² *Second*, There was refused to the *curator bonis* of a lunatic authority to borrow money for the purpose (*inter alia*) of implementing to the tenant the prestations of a lease by the proprietor previously to his lunacy.³ *Third*, An application by a pupil and his tutors for authority to grant leases of arable farms to endure beyond pupilarity was refused.⁴ And, *fourth*, The Court, contrary to an older case,⁵ would not interpose its authority, because unnecessary, in a process of sale by a minor and his curators.⁶ *A fortiori*, there would have been a refusal had the application been to authorise a lease.⁷

Art. 2.—
Authority
applied for
to do neces-
sary but not
ordinary
acts will be
granted.

Until a comparatively recent period the rule was held to be undoubted that only necessity established *causa cognita*, but not expediency, however clear, constituted the ground for the interposition of the Court.⁸ But doctrine has in later years been laid down [169] which, if it does not subvert the older rule, introduces a relaxation of it so great as to approach nearly to a subversion. An application was made by a factor *loco tutoris*, in the form of a petition, for power to borrow money and grant heritable security over the estate of the pupil. The whole of the judges having been consulted, an unanimous opinion was given both as to the competency of the form of application (of which hereafter), and as to the grounds on which the Court was warranted to proceed, and had proceeded, in granting extraordinary powers.

When ex-
traordinary
powers will
be given.

The opinion and the consequent decision embody general doctrine. For it is laid down that "wherever it has been made to appear to the Court that the power craved was either necessary to

¹ Sharpe's *Petra*, 27 Nov. 1832, 11 S. 93-4. *Pitcairn, &c., Pet.*, 8 Dec. 1838, 1 D. 212, 11 Jur. 166.

² *Home, Pet.*, 1793, Mor. 16,382. [Cf. *Cruickshank v. Ewing*, 22 Dec. 1864, 3 Macph. 302.]

³ *Henderson, Pet., ut sup.*

⁴ *Ross v. Ross, ut sup.*

⁵ *Campbell v. Campbell*, 1738, Mor. 8830.

⁶ *Wallace v. Wallace*, 8 March 1817, F.C. No. 112, p. 322.

⁷ 1 *Ersk. vii. 16*, Note (by Ivory) 208.

⁸ 1 *Ersk. vii. 16*, Note (by Ivory) 207, sec. 17, and Note 212. 1 *Stair, vi. 18*, Note (by Brodie). *Colt v. Colt*, 1800, Mor. 16,387. *Colt v. Colt*, 1801, Mor. App. Tutor, &c., No. 1, p. 1. *Vere v. Dale*, 1804, Mor. 16,389. *Beatson, Pet.*, 24 Feb. 1810, F.C. p. 606. *Finlaysons v. Finlaysons*, 22 Dec. 1810, F.C. p. 114. *Ross v. Ross, ut sup.*

prevent serious loss to the estate, or expedient in order to procure evident and positive advantage, or where the interest of third parties connected with the estate was concerned, as, *e.g.*, in the relation of superior and vassal, &c. &c., the Court has been in the constant practice of granting the power necessary for accomplishing the object set forth in the petition. Even where only a contingent benefit was in view to the existing estate, and where there was no absolute necessity for the power, and no positive loss would have accrued from the refusal of it, the Court nevertheless granted the power craved. The factor *loco tutoris* on the Duke of Buccleuch's estate having applied for power to make a purchase of particular lands, it was granted, 10th January 1758—Craigie, petitioner."¹

Although the judgment applies in words only to a factor *loco tutoris*, yet in intendment and operation it must apply to tutors and curators likewise; for it could not be contemplated that the Court would refuse to the superior class of administrators those powers which they would confer on those who are appointed to supply the place of more formal guardians. In so far as the doctrine relates to the prevention of serious loss or to the protection of the interests of third parties, its soundness is undoubted; but in so far as it involves expediency or the supposition of contingent benefit, it may admit of reconsideration. *First*, It is apparently at variance with the opinions and the consequent judgments in a series of precedents. In one case it was laid down that a sale of a pupil's heritage could be sanctioned only where it was necessary for the payment of debt, or to avoid loss, or in cases of equal urgency; but that the Court could not sanction a project, the advantage to be derived from which might admit of opposite views.² So where the Court had authorised a sale, they reduced when the pupil attained majority, as the measure was at the best only an object of apparent advantage but not of urgent necessity to the pupil's affairs.³ Subsequently it was laid down that great necessity [170] was the only ground on which the Court could authorise the sale of a minor's estate; and that no views of expediency, however clear, were sufficient.⁴ And where authority was craved by tutors to grant leases of arable farms to endure beyond pupilarity, it was refused, because no necessity was proved, and the case involved "merely a question of expediency."⁵ The precedent relied on in the case now under examination is one in which authority was given to purchase land; but no difference

¹ Somerville's Factor, Pet., 6 Feb. 1836, 14 S. 451.

² Colt v. Colt, 3 July 1801, *ut sup.*

³ Vere v. Dale, *ut sup.*

⁴ Finlaysons v. Finlaysons, *ut sup.*

⁵ Ross v. Ross, *ut sup.*

creditors that otherwise the rents could not be raised.¹ This case is distinguishable from the preceding one, because there could be no sale; and it was only by using every means of increasing the rental that the creditors could be paid.

Judicial
Factors—
continued.

The Court refused to authorise the judicial factor upon an estate (of which the life interest had been adjudged by creditors) to grant leases for nineteen years, the period permitted by the entail, or to take renunciation of leases. The decision proceeded upon the principle already stated.² But where leases of grazing farms for nineteen years, which contained clauses binding the outgoing tenant to deliver to the proprietor or incoming tenant the stock at a valuation, had nearly expired, and the estate was very soon to be sold, and no tenant was willing, [176] except upon terms very injurious to the creditors, to accept of a lease for a year under an obligation to take the stocking, the Court authorised the judicial factor to let, by public roup or private bargain, those grazings for a period of three years.³ This judgment proceeded in part upon special necessity, and in part upon the precedent of an analogous case, in which a judicial factor, unable to let at the former rent, was authorised to let by auction for the period of three years.⁴

Of late the leaning is to relax the stringency of the rule; but the duration is regulated by the special cause shewn. An estate was sequestrated pending law proceedings which were likely to last for some years. The judicial factor applied for authority to execute formal leases, in terms of missives entered into by trustees before his appointment, and to relet the farms, the leases of which had expired; and he craved that the duration of the new leases should be thirteen years. The Court granted warrant for executing the formal leases in terms of the previous missives, and also for giving new leases, but refused to allow them for a longer period than seven years.⁵ Where an estate was wholly under grass, and formed a valuable and extensive wintering for sheep stock, and the judicial factor found it impossible to let it to any advantage for one year, the Court authorised him to let it for three years, because the application was reasonable in itself and sanctioned by precedent.⁶ If it shall be proved that it would be injurious to the estate, because hurtful to the tenants, to keep them bound by their leases, the Court will empower a judicial factor to accept renunciations and to relet by public roup after advertisement.⁷

¹ Campbell, &c. Pet., 1755, Mor. 7445.

² Proctor v. Gordon, 31 Jan. 1824, 2 S. 659, and 1 Br. Syn. 649 (Factor).

³ Morison, Pet., 19 Jan. 1832, 10 S. 204, 5 D. and A. 8.

⁴ Shaw, Pet., *ut infra*.

⁵ Brown, Pet., 7 Dec. 1832, 11 S. 190.

⁶ Morrison, Pet., 29 Jan. 1833, 11 S. 336.

⁷ Milne, Pet., 20 Dec. 1834, 13 S. 222; *Idem*, 25 Feb. 1836, and 10 March 1836, 14 S. 561 and 681.

During the dependence of a suit concerning the obligatory nature of missives of lease of urban tenements for seven years, the Court, on the application of the landlord, authorised the Sheriff-Clerk of the county to let either for the full period or for a shorter one, as he should deem advisable.¹

If the former rent cannot be privately obtained for lands out of lease, the Court will not, in the ordinary case, interpose its authority to let for a lower rent;² but, as formerly mentioned,³ the tutor or curator ought to let the lands by auction. A different rule has been applied to factors upon sequestrated estates, and to those appointed under the Act of Sederunt of February 1730. When for lands under sequestration the same rent cannot be obtained, although exposed by public auction, the factor must make an application to [177] the Court, detailing the ineffectual attempt to let by auction and the measures adopted by him for ascertaining the necessary diminution of rent, and craving authority to let at that diminished rent,⁴ which the Court will allow upon leases of the duration of two or three years.⁵ But in a comparatively recent case the Court gave authority to a judicial factor, as one of two alternatives, to grant an abatement of rent without a previous attempt to let by auction, as it was shewn that to keep the tenants bound by the terms of their leases would be injurious both to the estate and to them.⁶ On a precedent applicable to the factor on a sequestrated estate,⁷ the Court authorised a factor *loco absentis* to expose a farm to be let by public auction at a rent considerably diminished, and to grant a lease for seven years because it was a "rearing farm."⁸

The older rule was that the form of application to the Court for extraordinary powers must be made, not by summary petition, but by an action calling relations and all other parties interested.⁹ A summary application by a tutor-at-law to grant a lease of a cotton-mill for fourteen years was unanimously refused as incompetent.¹⁰ Nor would the Court, upon a summary application, authorise a tutor to grant a lease for thirteen years of sea mills belonging to a pupil, and an unanimous opinion was given, that if

¹ Douglas v. Jones, 18 Dec. 1829, 8 S. 274, 3 D. and A. 152.

² 1 Ersk. vii. 16. Tutor of Ayton, 1675, Mor. 5425.

³ *Ut sup.* sec. ii. of this chapter.

⁴ 3 Jurid. Styl. 2d ed. 843-5.

⁵ 2 Bell's Com. 266. Shaw, Pet., 1750, Mor. 4070.

⁶ Milne, 20 Dec. 1834, *ut sup.*

⁷ Shaw, *ut sup.*

⁸ Maclean, Pet., 2 June 1828, 6 S. 1018. [The Court would now in all probability give authority to let at a

rent shewn by reasonable evidence to be the highest that could be got, without requiring exposure by auction. Advertisement gives every advantage that can be got from auction. See Fraser, Par. and Child, 253, 502, and comp. Brown's Tutors, 16 July 1867, 5 Macph. 1046].

⁹ 1 Ersk. vii. 17, Note by Ivory, 212. 1 Bell on Leases, 134. More's Notes to Stair, *voce* Tutor and Curator, xxxviii. Plummer v. his Tutors, 8 March 1767, Mor. 16358.

¹⁰ Hallows, Pet., Mor. 14,981.

the authority of the Court were to be interposed, it could be only in a regular action *causa cognita*.¹

Summary
Petition.

But an alteration was gradually made in practice, and applications by tutors and curators, and the several classes of judicial factors for extraordinary powers, were entertained in the form of a summary petition, accompanied by such evidence as was deemed sufficient to prove the statement on which the application was founded.² A *curator bonis* having applied by a summary petition for power to sell the heritable property of a lunatic, in order to purchase an annuity, an objection to the competency of the form of procedure was stated by the trustee on the estate of his younger brother. The argument for the objector was founded on the general rule and relative decisions. The argument for the petitioner appears to have proceeded mainly on the special circumstances, and on the nature of the powers conferred by the Court on [178] the *curator bonis* of a lunatic. The objection to the competency was repelled; but the opinions of the Judges leave it doubtful whether the judgment proceeded on the special matter or on the principle that a summary application is competent in all cases.³

In a subsequent case, where an application was made by a factor *loco tutoris* to borrow money and grant heritable security over the estate of the pupil, an opinion was given by the whole Court that a summary application is competent; and the authority craved was granted.⁴ These decisions have fixed the rule; for, subsequently, numerous applications have been made by summary petition, without objection either by parties or by the Court.⁵ A note is the form prescribed to factors by the seventeenth section of 12 and 13 Vict. c. 51. "The Pupils Protection Act" (28th July 1849). [This class of applications is now dealt with by the Junior Lord Ordinary, subject to the review of the Court.⁶]

The authority of the Court will not protect a sale by tutors,

¹ Beatson, Pet., 24 Feb. 1810, F.C. No. 200, p. 606.

² McLean, Pet.; Slade, Pet.; Drummond, Pet.; Brown, Pet.; and Milne, Pet. *ut sup.* art. 2 of this sec. pp. 179-80.

³ Finlayson v. Kid, 4 June 1835, F.C. 627, 13 S. 861, 7 Jur. 394.

⁴ Somerville's Factor, Pet., *ut sup.* 177. In the opinion the case of Meikle v. Meikle, 7 March 1823, 2 S. 274, is apparently noted as a case in which the procedure was by a summary petition; but from the report the procedure seems to have been by an action.

⁵ Milne, Pet., in three cases, Ball or Bell, Pet., *ut sup.* 179. McGregor, Pet., 1 June 1837, F.C. 1034, 15 S. 1092. Fraser, Pet., 6 July 1838, 16 S. 1271. Ball, Pet. 24 Nov. 1838, 1 D. 109. Hamilton, Pet., 24 Nov. 1838, 1 D. 110, 11 Jur. 100. Hamilton, Pet., 16 Feb. 1839, 1 D. 520, 11 Jur. 342. Pitcairn, &c., Pet., *ut sup.* art. 1 of this sec. Forbes or Carnegie, Pet.; Ker, Pet.; Russell, Pet.; and McKenzie, Pet., and numerous other cases, *ut sup.* art. 2 of this section, pp. 179-81.

⁶ [20 and 21 Vict. c. 56, ss. 4, 8.]

curators, or administrators under the Act of Sederunt of February 1730, from subsequent reduction at the instance of the party lesed, if the transaction shall be proved to have been injurious.¹ On the same principle, extraordinary acts of leasing, although under a judicial warrant, may be annulled.²

Art. 4.—
Judicial
authority
does not
protect from
reduction.

SECTION V.—PRIVATE COMMISSIONERS OR FACTORS.

Commissioners, factors, or procurators, duly empowered, can grant leases, which bind their constituents in the same manner as if granted by those constituents themselves.³ A duration limited by that of the commission is assigned by Craig,⁴ but the *dictum* is directly at variance with authority and practice. Erskine says that [179] leases of ordinary duration granted by a commissioner subsist for the whole of the stipulated period, although during the currency the proprietor should recall his commission;⁵ and the same rule arises, by necessary implication, from the *dicta* in the other books.⁶ The powers of commissioners to lease vary with relation both to duration and rent. In the older styles commissioners were empowered to grant leases, not exceeding three years, "for such duties and services as they should think fit," but without diminution of the actual rent, or "dispensation from the accustomed services and other presents."⁷ More recently they were authorised to let without specification of duration or of rent;⁸ or, while no duration was stated, "for the accustomed duties;⁹ or "for the old duties," or "for the greatest duties which could be had for the time."¹⁰ In modern factories there is a special power to grant leases "for such a term of years (not exceeding nineteen), and for such yearly tack-duties, not less than the present tack-duties, as he (the factor) shall think proper."¹¹ While detriment can seldom be occasioned by limitation of the ordinary duration, a prohibition against letting at a diminished rent may be detrimental. Power to let for the highest attainable rent will always be prudent.

Factors duly
authorised
may grant
leases of
usual dura-
tion.

¹ Note (by Ivory), 212, to 1 Ersk. vii. 17. Note a (by Brodie) to 1 Stair, vi. 18. Vere v. Dale, 29 Feb. 1804. Finlaysons v. Finlaysons, 22 Dec. 1810, F.C. No. 30, p. 114. Wallace v. Wallace, 8 March 1817, F.C. No. 112, p. 322.

² Probably a different view would be taken in regard to powers granted under the Pupils Protection Act. See Moncrieff v. Miln, 15 July 1866, 18 D. 1291 (per L. Deas, Ordinary).

³ 2 Craig, x. 1. 2 Stair, ix. 3. 2 Bankt. ix. 18. 2 Ersk. vi. 21.

⁴ 2 Craig, x. 1.

⁵ 2 Ersk. vi. 21.

⁶ Stair and Bankt. *ut sup.*

⁷ 2 Dallas, 498.

⁸ Spots. Styl. 305.

⁹ Id. 302.

¹⁰ Id. 308.

¹¹ 2 Jurid. Styl., 2d edit. 270.

Commission must be written.

For the constitution of those leasing powers there are certain requisites. *First*, The commission must be in writing. This doctrine is expressly laid down by Craig,¹ and although not stated in words in the other Books, such is the obvious intendment.² Craig holds that property can validly be let for one year without a written mandate,³ but the exception is not made in the other Books nor sanctioned by any decision which has been discovered.

And express

Second, Although in the Books there is considerable variance as to the mode in which the power must be constituted, and there are inserted examples of powers of different kinds, the result is that the power must be specially conferred, either by direct words or by necessary inclusion under authority to do acts of greater importance. The *dictum* of Craig is, that the mandate must either embody the power specially, or be "*cum libera potestate*."⁴ Stair lays it down that leases may be granted by commission "if it be special as to tacks, or at least as to matters of greater importance, with a general clause for others."⁵ He does not describe what those other matters of greater importance are; but to sell, feu, or to enter vassals are examples. Erskine mentions only commissioners specially authorised to grant leases, necessarily meaning authorised in express terms.⁶ In Styles formerly noticed,⁷ the power is given in direct [180] words. Commissions which confer power to "input and output tenants"⁸ warrant the factor to let. But it has been said that they do not seem to give sufficient authority to grant leases for years.⁹ The opinion is unsound, because no rational distinction can be taken between those and other terms conferring power. Authority to remove or "output" tenants only¹⁰ does not give power to let, for the object of it is merely to create a vacancy, which the proprietor reserves to himself the power of supplying. A factor, where his commission authorised him in general terms to sue and defend, but did not specify actions of removing, was held not to be entitled to pursue an action of removing.¹¹

Power to input and output tenants.

Termination of factory.

If after revocation of a factory, and sufficient publication of its recall, the *quondam* factor shall grant leases, those leases, in the ordinary case, will be void. A factory granted for life having been, for valid causes, revoked, and a new factor having been appointed, his appointment was intimated to the tenantry at a

¹ 2 Craig, vii. 4.

² Stair and Ersk., *ut sup.*

³ 2 Craig, vii. 4.

⁴ 2 Craig, x. 1.

⁵ 2 Stair, ix. 3.

⁶ 2 Ersk., vi. 21.

⁷ 2 Dallas, Spots., and 2 Jurid. Styl., *ut sup.*

⁸ 2 Jurid. Styl. 3d. edit. 287-8.

⁹ 1 Bell on Leases, 133-4.

¹⁰ 2 Jurid. Styl. 3d edit. 292.

¹¹ York Buildings Co. v. Carnegie, 1764, Mor. 4054.

Baron Court, and was recorded in the Books of the Regality. The actual factor having granted leases, the same subjects were leased by the *quondam* factor likewise. In a competition between the granters, tried in the form of an action of removing, the right granted by the new factor was sustained.¹ But in practice there might arise important modifications of the doctrine. For example, if a factor were to make advances on the faith of the continuance of his powers, it would be difficult to affirm that by a recall previous to repayment his powers of letting would be subverted.

Under a trust-deed, which constituted two out of three trustees to be a quorum, and gave power to name a factor, one of the trustees who acted as factor was found to have the power of binding his co-trustees by letting property rent-free to the husband of the party whose property they held in trust, although the purpose of the trust was to save it from the *jus mariti*.² The character of the factor being united with that of trustee, the existence of extraordinary powers may have been implied. And that implication, combined with the rationality of the measure, sanctioned an act, the validity of which, if done by an ordinary factor, would have been doubtful. Factors with common powers cannot grant rental rights, which, by reason of their extraordinary nature, can be granted only by the "heritor of the ground,"³ or "by those having a special commission from him."⁴

Factor also
Trustee.

CHAPTER V.

TENANT CONSIDERED AS A LESSOR.

[181] WHEN a tenant has power to sublet, and exercises it, he may be deemed as standing in the character of lessor towards the sublessee, who comes under stipulations towards him of the same nature which he comes under towards the landlord. But as the relation thus created depends upon the doctrine of sublease, and the consequent rights and duties, it is unnecessary to enter into a discussion separate from that which will emerge when these subjects are examined.

¹ Heddington v. Book and Dod, Mor. 4047.

² Kay v. Miln, 4 Feb. 1830, 8 S. 437.

³ 2 Stair, ix. 17, 2 Bankt. ix. 41.

⁴ Bankt. *ut sup.*

CHAPTER VI

LEASES

THE legal character of the contract of lease having been considered, the legal character of the tenant or lessee is now to be treated of. There is some difference of opinion as to those persons who can be lessees and who cannot.

SECTION I.—LEASES.

Any person who has attained majority may be a lessee, if not disqualified either by natural or legal incapacity.

Art. 1—
A lease
may be

MENTAL AND LEGAL INCAPACITY.—Although blindness may in itself be deemed to be a bar, it ceases to be so on the adoption of the proper precautions;¹ and deaf and dumb persons who might otherwise be disqualified when they have been educated, or gained sufficient capacity, may be lessees.²

Lease
interd.
int. of
lease person
restriction

IDIOTRY OR FURIOUSITY.—The rule of the law of England is, that all persons whatever, although they be idiots or lunatics, infants or married women, may be lessees, because a lease is always presumed [182] to be beneficial.³ But the law of Scotland does not admit of a presumption which must often prove at variance with reality. In the absence of direct authority, and relying upon principle and analogy, it may be held that the rule of the Scottish law is, that a lease entered into by an idiot or lunatic is reducible by the curator, heir, or creditors of the idiot or lunatic, and by the lunatic himself, when he shall have convalesced, because there never was a valid contract.⁴ But the power of reduction belongs to those parties only; for the lessor cannot be held to possess a similar power. If he enter into the contract, being cognisant of the

¹ *Supra*, c. i. s. p. 81.

² As in preceding note, pp. 81-83.

³ Woodfall's Law of Landlord and Tenant, 135, *ex parte Jermy*. ⁴ Swanst. 131. The references are made to the 2d edit. 1829, as in it the text is more free from interpolation than it is in any subsequent edition.

¹ 1473, c. 67; Balfour, 123, c. x.; 1 Craig. xii. 29; 1 Stair, x. 13; Mackenzie, Obe. 52; 1 Bankt. vii. 9-12; 1 Ersk. vii. 48-52; 1 Bell's Com. 136-9; and Title of Idiocy and Furocity in "Dictionary of Decisions."

condition of the other party, *sibi imputet*, and he must take the consequences.

If the insanity should supervene, it may be a question of some nicety whether the lease shall continue to be binding. But the rule more equitable and accordant with modern views appears to be, to hold that the lease is valid, and that the lunatic is entitled to possess through his curator. Originally it was so, as the lessee was then of a sound and contracting mind, and a valuable interest to an heritable right having been acquired, the realisation and transmission of it must be protected.

An objection may be derived, *first*, from the doctrine of *delectus persone*, which pervades the law of leasing;¹ according to which, in agricultural leases of ordinary duration, voluntary assignees are excluded if there be not power to assign.² And where assignation is expressly prohibited, creditors are debarred from benefiting by the lease through the administration of a manager.³ But the rule of *delectus persone* might be deemed to be infringed by obliging the landlord to submit to the management of a curator and overseer. This analogical argument, however, is met by another derived from the same branch of law. The right of the tenant's heir, though a pupil, to succeed to the lease, and the consequent devolution of management upon an administrator, are undoubted. In consequence, there is a subversion of the *delectus persone*, which the lessor has not power to prevent. If it was deemed necessary or equitable, that where skill and capital had been employed the benefit should endure for a determinate period, and failing the original lessee accrue to his heir, on the same principle, a lunatic is entitled to a similar benefit through his curator.

Second, An [183] adverse argument may also be drawn from the analogy of the law of partnership, according to which the insanity of one of two partners, by which he is rendered incapable of contributing skill and industry, seems to be a good reason for dissolving the contract.⁴ But the analogy is not complete, because, in default of special stipulation, there can be no substitution of the heir of a partner, and, consequently, no administration through a curator. Neither of the analogical arguments is therefore subversive of the rule.

¹ 1 Ersk. vi. 31. ² Ross' Lect. 482-8. ³ 1 Bell's Com. 75-82.

² Ersk. and Bell's Com. *ut sup.*

³ 1 Bell's Com. 81. *E. Dalkousie v. Wilson*, 1 Dec. 1802, Mor. 15,311. *Munro v. Miller*, 11 Dec. 1811, F.C. 384. *Watson v. Douglas*, 13 Dec. 1811, F.C. 412.

⁴ 2 Bell's Com. 635. *Bell's Pr.* 376.

1 Montague on Partnership, 89. *Coll-
yer's Law of Partnership*, 194-5. *Per*
Lord Kenyon, in *Sayer v. Bennet*, 1
Montag. Notes, p. 16. *Waters v. Tay-
lor*, 2 Ves. and B. 303. *Jones v. Nye*,
2 Myln. and K. 125. *Wrexham v.*
Huddleston, 1 Swanst. n. 504.

Art. 2.—
Legal in-
capacity.
Forfeiture
of Lessee.

Forfeiture
for treason.

Forfeiture and escheat single and liferent, although by the Statute 20 Geo. II. c. 50, section eleventh, abolished in civil matters, still exist in matters criminal.¹ By their operation an incapacity to hold leases may be produced.

In terms of 7 Anne, c. 21, forfeitures upon conviction of high treason or misprision of treason are governed by the English rules, which form an integral part of the law of Scotland.² One of these rules is confiscation of real property, and of chattels or moveables.³ By the law of England leases for the life of the lessee himself, or for that of another person, are real estates;⁴ and leases for a determinate period, of whatever length, are chattels, which, although "savouring of the reality," constitute a portion of the moveable estate.⁵ In consequence, leases, both liferent and for years, must in Scotland accrue to the Crown, contrary to the ordinary Scottish rules of escheat, by which the former accrue to the landlord.⁶ By the 1 Geo. I. c. 20, commonly called the Clan Act, an exception was introduced. If a tacksman was attainted, the tenement, together with the single and liferent escheat, was to devolve to the landlord abiding in his allegiance.⁷ But by the 21 Geo. II. c. 34, this provision ceased to be in operation after the 29th day of September 1748.⁸

Escheat in
crimes.

Escheat is *inter essentialia* of a sentence of death, and⁹ by special statutes it forms part of the punishment of certain crimes not [184] capital. *First*, By 1551, c. 19, of perjury and bigamy.¹⁰ *Second*, By 1581, c. 118, and 1582, c. 150, of deforcement.¹¹ *Third*, By 1581, c. 118, of breach of arrestment.¹² *Fourth*, By the Statute 1597, c. 247, confiscation of moveables was declared to be part of the punishment of usury; and Erskine in one passage deems the provision operative,¹³ but in another passage, more full and specific, he appears to limit its efficacy to transactions previous to the 12 of Anne, c. 16.¹⁴ Hume indicates a strong opinion that this penalty ceased after the enactment of the British statute.¹⁵ Combining

¹ 2 Bankt. iv. 37; 2 Ersk. v. 39; 3 Jurid. Styl. 2d edit. 196, Note 7; Bell's Pr. 720, 754; Bell's Notes to Hume on Crimes, p. 229.

² 3 Bankt. iii. 4, 36, 41, 47; 4 Ersk. iv. 24; 1 Hume 506-7.

³ 3 Bankt. iii. 49; Ersk. *ut sup.*; 1 Hume 538; 4 Blackstone's Com. 386.

⁴ Woodfall's Law of Landl. and Ten. 160-7; 2 Blackstone's Com. 386-7.

⁵ Woodfall, 167-8; 2 Blackstone's Com. 386-7.

⁶ 3 Ersk. v. 68.

⁷ Hope's Min. Pract. t. vii. s. 15, Note; 2 Bankt. iv. 42; 1 Hume 538, Note 1.

⁸ Hume, *ut sup.*

⁹ 3 Bankt. iii. 18; 2 Ersk. v. 57; 2 Hume 464.

¹⁰ Mackenzie, Crim. Law, 94, 152; 3 Bankt. iii. 17; 2 Ersk. v. 57, and 4 iv. 53; 1 Hume 372, 455; 2 Hume 473.

¹¹ Mackenzie Crim. Law, 129-30; Mackenzie Obs. 293; 3 Bankt. iii. 17; 2 Ersk. v. 57, and 4 iv. 32; 1 Hume 392; 2 Hume 473.

¹² Mackenzie Obs. 203; 3 Bankt. iii. 17; 2 Ersk. v. 56, and 4, iv. 36.

¹³ 2 Ersk. v. 57.

¹⁴ 4 Ersk. iv. 78.

¹⁵ 2 Hume 499.

that opinion of Erskine which is most detailed with that of Hume, the result seems to be that this penalty is abolished or in total desuetude.

Leases for terms of years (to liferent leases a different rule applies), although heritable as to succession, fall under the single or simple escheat, by which they devolve to the Crown, to the exclusion of the lessee, his heirs, and all other persons deriving right through him.¹ Doubts have been suggested whether leases of extraordinary duration come under this rule. Steuart says that it "seems very hard that a tack of several nineteen years, exceeding any probable amount of the tacksman's life," should be thus subjected.² Mackenzie holds that if a lease be granted for fifty or sixty years, it will fall under the single escheat, but doubts if a lease for a hundred years will.³ Erskine, on the authority of Steuart, states that "it would seem that leases of unusual, but determinate, duration should fall under, not the single, but the liferent escheat."⁴ This opinion is supported by the ancient rule,⁵ sanctioned by a subsequent statute,⁶ that where the lease is for several lives, it shall be forfeited during the life only of the criminal, and shall accrue to the surviving lessees. There is indicated by this provision a strong intention that the confiscation should not exceed the calculated duration of one life, which at that period ordinary leases never did.

Not only is the moveable property belonging to the criminal at the date of his sentence forfeited, but all which shall accrue to him until he receive a pardon.⁷ In consequence, leases which he shall acquire, either by succession or contract, devolve to the Crown. The forfeiture was occasionally held to be operative in favour of the donatary, even after the death of the person forfeited. A party who [185] had the survivancy of a tack, having been forfeited and his escheat gifted during the life of the tenant, it was found that upon the tenant's death the donatary of the forfeited person did succeed to the tack in his right.⁸ And a liferent lease having been granted to a man, and a nineteen years' lease thereafter to his heir, it was held that, although his escheat fell, it could not comprehend his heir's lease; but he having thereafter committed treason, it was found that the inability of his posterity made his heir's lease to fall under escheat and forfeiture.⁹

¹ Balfour 207 and 553-6; Hope's Min. Pract. t. vii. s. 5, and Note s. 7; Dir. and Steu. 120; 2 Stair, i. 4; 2 Stair, ix. 24; and 3 Stair, iii. 15 and 26; 2 Mackenzie Inst. v., compare sec. 25 and 26; 2 Bankt. ix. 30, and 2 Bankt. iii. 21; 2 Ersk. ii. 6, and v. 61; 1 Bell on Leases, 29.

Dir. and Steu. *ut sup.*

² Mackenzie Ob. 352.

³ 2 Ersk. v. 70.

⁴ Balfour 554.

⁵ 1617, c. 15.

⁶ 3 Stair, iii. 15; 3 Bankt. iii. 21; 2 Ersk. v. 61.

⁷ Hatton v. Murray, 1552, Mor. 4658.

⁸ Lindsay v. Bonnitown, 1602, Mor. 4663.

1617, c. 15.

On the preamble that it had not been clearly decided whether a liferent tack should fall under the simple escheat or not, it was, by the statute 1617, c. 15, enacted that such leases should fall under liferent escheat only. And the statute continued *in viridi observantia*.¹

By an old decision "such tacks were found to fall to the King;"² and Bankton says "that regularly the liferent escheat of tacks falls to the King, as that of all particulars not holden of any superior."³ But Stair holds that "these tacks befall to the master of the ground,"⁴ in which doctrine Erskine coincides; "for the tacksman derives right from the landlord alone, and is bound to acknowledge no other."⁵ Preference is due to the opinions of Stair and Erskine, *first*, because the obstant decision was given before the enactment of the Statute 1617, c. 15, the preamble of which proves that previously no definite line had been drawn between single and liferent escheat; and *second*, because, besides his general inferiority as an authority, the terms of the opinion of Bankton manifest doubt of its compatibility with the existing law.

With the same intention of softening the rigour of forfeiture, the Statute 1617, c. 15 (as already noticed), embodies a provision that "in case any tack, set of lands or tiends, contain moe liferents nor one," the person having right to the said tacks, after the decease of the forfeiting liferenter, "shall brook and enjoy the same, notwithstanding the saids liferenter's rebellion attour the space of year and day; which rebellion shall prejudice himself only, and no other person succeeding to him in the right of the said tack." In accordance with this provision, it was held "that a tack set for liferents" could not fall under the single escheat of the life lessee, conform to the Act of Parliament."⁶

Although rental rights bear a very close resemblance to liferent [186] leases, and have been ranged under the same class,⁷ they fall under the single escheat.⁸ Liferent leases, in their technical intendment alone, are set forth under the statute. But the Act being remedial, was strictly interpreted. Therefore rental rights not having been specified, and differing in some respects from pure

¹ Hope's Min. Pract. t. vii. ss. 2 and 5, and Note to 5. ² Stair iv. 62, ix. 24, and 3 Stair iii. 15. ³ Mackenzie Inst. v. 25, 26. Mackenzie Ob. 352. ⁴ Bankt. iv. 40, ix. 46. ⁵ Erak. v. 61, 66, 68, 70. Sandford on Ent. 303.

⁶ Leslie v. Stewart, 1598, Had. cited in a note by Pulteney to 2 Stair, iv. 62.

⁷ 2 Bankt. iv. 42.

⁸ 2 Stair, iv. 62.

⁵ 2 Erak. v. 68.

⁶ Stuart v. Lady Samelston, 1631, Mor. 3623.

⁷ 2 Bankt. ix. 45.

⁸ Balfour 353. Hope's Min. Pract. t. vii. Note to sec. 5. The Queen's Advocate and George Crawford v. James Archibald, 29 June 1556; Balfour, *et sup.*

liferent leases, were held to have been excluded. In none of the Books has there been discovered any contrary *dictum*.

A pardon is either free, releasing the convict from all the consequences of the sentence, or under a reservation of all the forfeitures and escheats accruing from the conviction.¹ The former is the course where, the escheat being vested in the Crown, it is graciously intended to restore the criminal to the possession of his forfeited property. But the latter course must be adopted where the interests of third parties intervene by gifts of ordinary leases, or the establishment of the landlord's right to the escheat of those for life.

Effect of
pardon.

SECTION II.—CROWN.

The sovereign may be a lessee either through commissioners or through a donatary.

By the 3 and 4 Will. IV. c. 69 (28th August 1833), the Commissioners of Woods and Forests are empowered to purchase, exchange, and take leases of land in Scotland conformably to the provisions of the 10 Geo. IV. c. 50 (19th June 1829).

Art. 1.—
Crown as a
statutory
lessee.

The observations made when treating of the 10 Geo. IV. c. 50, relative to the powers of the Sovereign as a lessor, are referred to as applicable here.² By the forty-seventh section of that statute, the Commissioners of Woods and Forests are authorised to take from any person or body corporate leases of lands, tenements, or hereditaments for such a period, at such a rent, and subject to such covenants, conditions, and provisions, and on such terms, as to the said Commissioners shall seem meet. And by the forty-eighth section they are authorised to purchase leases. In terms of the forty-ninth section they are empowered to cause every lease purchased, taken, or exchanged by them to be assigned to a trustee or trustees. And by the fiftieth section leases purchased by them may be either merged in the Crown or assigned to trustees, so that they may be kept on foot distinct from the royal inheritance.

The provisions of the Statutes 3 and 4 Will. IV. c. 69, and 15 and [187] 16 Vict. c. 62 (30th June 1852), applicable to the Crown as a lessor, apply also to the Crown as lessee.³

Leases of the property of subjects may accrue to the Crown by forfeiture or escheat, or by default of heirs, in consequence of the

Art. 2.—
Donatary of
the Crown.

¹ 2 Hume 481.

² *Supra*, c. iii. s. i. p. 133.

³ *Supra*, c. iii. s. i. pp. 133, 134.

total failure of those of a person of lawful birth, or by the death of a bastard without issue. But as it is an established rule that the Sovereign cannot act in a subordinate capacity, he cannot be the lessee of his subject,¹ and therefore he transfers by a gift to a donatary leases so accruing. It has been decided that the Sovereign cannot transfer to a donatary a lease accruing *ob defectum heredis* if assignees and sublessees are excluded; and a general opinion was expressed (with what soundness shall be afterwards examined), that the same rule applied even where there was no such exclusion.² But from this opinion leases accruing by forfeiture or escheat are excluded, because it is expressly limited to those accruing *ob defectum heredis*. Were it of general operation it would be equivalent to a rule that leases cannot devolve to the Crown contrary to the rule that leases fall under forfeiture and escheat,³ and are in terms included under gifts of escheat.⁴ Although the Sovereign has the absolute power of disposal, the gift is generally made to the creditors or relations of the criminal.⁵

SECTION III.—PAPIST.

Most happily these incapacities from religious causes, which resulted partly from political expediency and partly from a spirit of intolerance, require now to be noticed merely as matter of history. The Statute 1700, c. 3. enacted that "no professed papist" shall be capable of purchasing or enjoying "tacks of lands," and that all voluntary deeds in his favour "shall *eo ipso* become void and null". On that statute it was decided that a lessor granting a lease to a papist, knowing him to be such, was not barred *personali exceptione* from reducing the lease; and second, that a removing against such a lessee might be sued without a formal process of [188] reduction.⁶ When more liberal and enlightened views began to operate, it was decided that a papist might take a lease by succession; and it was observed that the intention of inserting the clause relative to leases was to pre-

¹ *Falconer v. Hay*, 1789. Mor. 1355. [Hence, leases to the Sovereign under the Crown Private Estates Acts, are taken in name of trustees.]

² *Falconer v. Hay*, *ut sup.*

³ *Shrews.* c. vi. s. i. p. 192.

⁴ 1 Dallas, part ii. pp. 91 and 93.

⁵ 3 Jurid. Syst. 2d edit. 196. The following questions may be raised. First, by virtue of the 3 and 4 Will. IV. c. 60, and the 10 Geo. IV. c. 50, would

the Commissioners of Woods and Forests acquire a right to leases accruing to the Crown? or at least, second, in practice (where no favour to individuals was intended), would they be made over to them? and third, would an exclusion of assignees operate against them or debar their right of conveying to a trustee?

⁶ *Stewart v. Webster*, 1741; *Elchies*, *see* Papist, No. 1.

vent papists from disappointing the statute by obtaining leases of lands for elusory rents.¹ By the Statute 33 Geo. III. c. 44 (3d June 1793), there was prescribed a form of oath, upon taking which all persons professing the Roman Catholic religion in Scotland were relieved from all the penalties and disabilities of the Act of 1700, c. 3, and were "as fully enabled to take by descent, purchase, or otherwise, and to hold, enjoy, alienate, settle, and dispose, of any real or personal property whatsoever within that part of Great Britain called Scotland, as any other person or persons whatsoever."² The Statute 10 Geo. IV. c. 7 (13th April 1829), imparted to Roman Catholics the full rights and privileges of British subjects.

SECTION IV.—"ACT DISCHARGING BUTCHERS TO BE GRASIER."'

In a similar spirit of illiberality, operating on a more narrow scale, there was passed the Statute 1703, c. 7, "discharging butchers to be grasiers." It enacted that no butcher or flesher could, for the purpose of grazing, take or possess, directly or indirectly, more than one acre of land, under the sanction of forfeiture of the cattle and sheep found upon the land and of a pecuniary penalty; and existing or future leases contrary to the Act were declared null after Whitsunday 1704.³ The object of this preposterous law is said to have been to prevent forestalling and monopoly by the union of the trades of butcher and grazier.⁴ Almost immediately after its enactment the Court appears to have perceived its absurdity; for it was decided that it "concerned only tacksmen graziers," and therefore did not hinder butchers holding lands, either in property or by redeemable rights, from using them for pasture.⁵ While Forbes approves of this decision,⁶ Fountain-hall appears to hint doubts of its soundness.⁷ In the practice of the country no attention was paid to the statute;⁸ and accordingly in a later case it was the general and sound opinion of the Court that it was in disuetude.⁹

¹ Watson v. Gordon, 1783, Mor. 9615.

² 2 Ersk. iii. 16, Note †.

³ 2 Bankt. ix. 19.

⁴ Ogilvie v. Mellis, 1708, Mor. 2020.
Maga. of Edinburgh v. Corporation of
Fleishers, 1789, Mor. Burgh Royal, App.
No. 6. 1 Bell on Leases, 144.

⁵ Ogilvie v. Mellis, *ut sup.*

⁶ Mor. *ut sup.*

⁷ In Wallace v. Cunningham, 1708,
Mor. 2348-9.

⁸ Bell on Leases, *ut sup.*

⁹ Maga. of Edinburgh v. Corporation
of Fleishers, *ut sup.*; Bell on Leases, *ut
sup.*

SECTION V.—ALIEN.¹

Art. 1.—
Doctrines of
the common
law.

[189] The doctrine of the law of Scotland is that, without naturalisation or denization, aliens cannot acquire or hold feudal property.² There is a recent statute, 7 and 8 Vict. c. 66 (6th August 1844), enabling aliens to hold leases of limited duration; but hitherto no rule appears to have been established at common law relative to their power of becoming lessees. It is material that the doctrine of the common law should be examined. If it recognises their right, or does not exclude it, aliens may hold leases of any duration; for the statute expressly reserves to aliens residing in Great Britain or Ireland every right relative to the possession or enjoyment of real or personal property which they previously enjoyed. The subject is important from the progressive increase of British connection with foreign countries.

On a subject closely allied to international law, it is proper and usual, in the absence of municipal regulation or authority, to have recourse to the laws of other countries.

France.

By the former law of France, "*quant aux droits civils utiles, comme les successions, les testaments, et autres semblables,*" the powers of aliens being regulated by the powers granted to subjects of France by the country of the alien,³ necessarily varied according to the tenor of treaties.⁴ The rule was abrogated by ordinances in 1814 and 1819, since which time a foreigner enjoys precisely the same privileges in respect of property with a French subject.⁵

Holland.

In Holland numerous restrictions were at one time imposed upon aliens; but by degrees, and in proportion as the relations of that country became more extended, those distinctions were done away, and aliens who established themselves there were admitted to all the rights of native subjects except the right of holding public offices.⁶

Spain.

[190] No express rule, either permissive or prohibitory, appears to exist in Spain. Judging from the severity of the restrictions

¹ Aliens are not now incapable of holding real property either as proprietors or lessees; 33 and 34 Vict. c. 14, s. 2.]

² 1 Craig, xiv. 4, 5; 2, xviii. 24, 5. 2 Bankt. 60, 62, 63, 64, 65. 3 Ersk. 2. 10. Bell's Fr. §135. More's Notes, x.

³ Pandectes Francaises (Code Civil), tom. i. p. 136. Code Napoleon, l. i. t. 1, chap. 1, sec. 11. Esprit du Code Napoleon, tom. i. 273.

⁴ Pandect. Franc. *ut sup.*

⁵ 1 Burge Conflict of Laws, 704. Report of Select Committee of House of Commons on the laws affecting Aliens, 2 June 1843, pp. v. and viii. Evidence of Lord Brougham before that Committee; Min. of Evid. p. 9.

⁶ Inst. of the law of Holland, by Vanderlinden, translated by Henry, p. 68. Comment on the Roman Dutch Law, by Vanleeuwen, pp. 49-52. 1 Burge, 696.

imposed upon aliens in matters of inferior importance,¹ it might have been presumed that they are not empowered to become lessees. But as in the laws relating to the purchase and sale, the inheritance or the renting and letting of lands and houses, there is no exclusion of aliens, but the transactions are said to be open to all,² the right of aliens to become lessees may be deemed to be included.

The abstract rule of the law of the United States of America with relation to leases to aliens, is in accordance with the common law of England, which, as will immediately appear, is unfavourable to the rights of aliens. But it is laid down that the force of the rigorous doctrine of that law is undoubtedly suspended in the United States in respect to the subjects of those nations with whom they have commercial treaties. It would even appear that the American jurists deem that it should be considered to be in total abeyance, as inconsistent with the established maxims of sound policy and the social intercourse of nations. Foreigners, it is said, are admitted to the rights of citizenship in the United States on liberal terms; and as the law requires only five years' residence to entitle them and their families to the benefits of naturalisation, it would seem to imply a right in the meantime to the necessary use of real property; and if it were otherwise the means would be interdicted which are necessary to render the five years' residence secure and comfortable.³

[191] The law of Ireland demands special attention. By the 14 and 15 Charles II. c. 15,⁴ Protestant strangers settling in Ireland within seven years, and taking certain oaths, were entitled to hold lands and all relative real and personal rights. The privileges were renewed for limited periods by the Acts 4 Will. and Mary, c. 2, and 7 Anne, c. 14,⁵ and were made perpetual by 4 Geo. I. c. 9.⁶ By the 19 and 20 Geo. III. c. 29,⁷ and 23 and 24 Geo. III. c. 38,⁸ all foreigners of any sect (except Jews) settling in Ireland and taking the oaths prescribed are to have the rights of natural-born subjects, with the exception of being eligible to Parliament and of having certain other political privileges. The preambles of these statutes expressly proceed on the policy of encouraging

¹ Instit. of Civil Law of Spain, by Del Rio and Rodriguez, transl. by Johnston, b. i. tit. 5, pp. 28-9.

² Partida. v. tit. v. l. ii. tom. 3, p. 177; tit. viii. l. ii. p. 219. Partida. vi. tit. iii. l. ii. p. 380. Del Rio and Rodriguez, by Johnston, book ii. tit. 13, p. 207, *et seq.*; book ii. tit. iii. p. 114; book ii. tit. xiv. p. 224, *et seq.* 1 Burge 698.

³ 2 Kent's Commentaries on American Law, p. 61.

⁴ Irish statutes at large, vol. ii. p. 449, 502.

⁵ *Ib.* vol. iii. pp. 243-5, and vol. iv. p. 48, 51.

⁶ *Ib.* vol. iv. pp. 459-61.

⁷ *Ib.* vol. xi. pp. 807-9.

⁸ *Ib.* vol. xii. p. 692-4.

foreigners to settle in Ireland. This law is considered to be still in force in that country.¹

England.

According to the common law of England, if a merchant alien take a lease for years of lands, meadows, &c., the king, upon office found, should have it. But of a house for habitation he might take a lease for years as incident to commerce, for without habitation he could not merchandise or trade. But if he relinquished the realm or die, the king should have the lease. If the alien were no merchant, then the king should have the lease for years, albeit it were for habitation.² The doctrine that if the alien were not a merchant the lease should be forfeited to the Crown, has justly been said to be severe, and has even been questioned.³ And the same view has been indicated by an eminent American jurist in applying the English law of alienage.⁴

32 Henry
VIII. c. 16.

A material restriction even on the rule of the common law of England was made by the Statute 32 Henry VIII. c. 16, sect. thirteenth, by which all leases of any dwelling-house or shop within the realm granted to any stranger, artificer, or handicraftsman born out of the king's obeisance, not being a denizen, were declared to be void and of no effect.⁵ This statute has been construed very strictly in favour of aliens.⁶ Although the statute made leases of dwelling-houses or shops granted to a stranger artificer void, yet if such [192] artificer occupied a dwelling-house or shop under an agreement which did not amount to a lease, as if he were a tenant from year to year or for a shorter time, an action for use and occupation was held to lie against him notwithstanding this statute;⁷ and although an alien artificer could not as such take a lease of a dwelling-house or shop by reason of this statute, yet he might occupy a tenement of £10 a-year, and carry on his trade like any other person. And as he might do so, he had that interest which enabled him to gain a settlement by the provision of the Legislature.⁸ This statute has justly been described as contrary to sound policy and the spirit of commerce.⁹

¹ Report of Committee on Aliens, 1843, pp. 6, 7.

² Coke on Littleton, Hargrave's and Butler's edit. Of Fee-simple, 2 b. l. 1. c. 1, sec. 1. Hansard on Aliens, p. 13, note n, and 123-4. Woodfall, pp. 138-9. Coote's Law of Landlord and Tenant, p. 70.

³ Note 9 by Hargrave to Coke on Litt. *ut sup.*

⁴ Kent's Com. *ut sup.*

⁵ Note 7 by Hargrave to Coke on Litt. *ut sup.* Woodfall, *ut sup.* Coote on Landl. and Ten. p. 71. Hansard on

Aliens, 124-5. Jevens v. Harridge, 1 Saund. *et in notis.*

⁶ Note by Hargrave, Coote and Hansard, *ut sup.* Jevens v. Harridge, 1 Sid. 309, and 1 Saund. 7. Pilkington v. Peach, 2 Shaw 135. Bridgeham v. Frontee, 3 Mod. 94. Prodgers v. Arthur, 3 Salk. 29.

⁷ Woodfall, *ut sup.* Jevens v. Harridge, *ut sup.*

⁸ Woodfall, *ut sup.* Rex v. Eastbourne, 4 East. 103-7.

⁹ Note 7 by Hargrave to Coke on Litt. *ut sup.*

As already indicated, no rule was laid down relative to the right of aliens to be lessees (previously to the late Act) in Scotland either by statute or decisions or the *dicta* of the Text writers.¹ In a recent work it is indeed said that an alien cannot hold a lease for years, but may hire a house for habitation.² This *dictum* rests on no authority, and from the phraseology it has obviously been borrowed from the common law of England. When the doctrine which it involves is tested by principle, it may well be deemed to be unsound.

Law of
Scotland.
Historical
view.

The governing principle is formed by a combination of policy with the laws and usages of other nations. The good policy of admitting aliens to the temporary right to real property created by lease, and the bad policy of excluding them, are too evident to require discussion, and have been practically conceded. On comparing the foreign laws which have been cited, the result is in favour of the recognition of the right of aliens to hold leases; for England seems to have stood alone in enforcing the doctrine of exclusion. There was a recognised difference in the law even of the British empire, as in Ireland the right existed.

[193] When these results are combined with the definite but limited grounds on which aliens are, by the law of Scotland, excluded from holding feudal property, an opinion may justly be formed favourable to their power of being lessees without limitation of duration and without restriction either as to the nature of the subjects or the exercise of the right. Craig, Erskine, and Bankton (Stair does not discuss the subject) concur in founding the exclusion on the rule that there cannot be double feudal allegiance.³ But as this reason is necessarily confined to feudal subjects, leases do not come under its operation. It is admitted that the lease of a house from year to year for the purposes of habitation is valid. On what principle can a distinction be made between such a lease and one of agricultural, mineral, manufacturing or other subjects for a term of years? Neither the subject-matter nor the duration affect the nature of the contract, nor infuse into it either the principle or the form of feudalism. Even by the rule of the common law of England, as ancient in date as it is obsolete in spirit, merchant aliens were admitted to hold

¹ No analogy is afforded by the case of *Macao v. Officers of State*, 14 Nov. 1820, F.C. 177, aff. 10 May 1822, 1 S. App. 138, because, *first*, that case turned exclusively on the construction of the Statute 1695, erecting the Bank of Scotland; and *second*, because the question involved was the right of foreign stock-

holders to become by that statute naturalised subjects in Scotland. Denial of a right to naturalisation, and not objection to the validity of a temporary right granted to aliens, formed the gist of the decision.

² Bell's Pr. §135.

³ Craig. *Ersk. Bank. ut sup.*

leases "for years of lands, meadows, pastures, woods, and the like;" although by the enforcement of peculiar forms such a lease might be forfeited to the Crown.

Anterior to the Union with England, although the Scotch Courts did not expressly recognise the right of aliens to hold heritable property, yet they admitted an alien claiming on an infestment of annual rent to be ranked *ad interim*, in order that he might intromit with the yearly proceeds upon caution, until the question of his right to be absolutely ranked was decided.¹

Leslie v.
Forbes, and
Leslie v.
Grant.

In the noted case in which it was held that an alien cannot succeed to lands in Scotland without being naturalised,² the *ratio* was the necessity since the Union of assimilating the Scottish to the English law of alienage. In a subsequent case doctrine involving the like result was laid down as governing. A person who was a natural-born subject of England, and had issue, died abroad before the 7th Anne (Naturalisation Act), out of allegiance of the King. His son had issue L, also born out of the allegiance of the King. Question of law submitted to the whole Judges of England—Whether L was capable of inheriting landed estates in Scotland? It was held unanimously, on full consideration of the statutes, that L was to be deemed an alien, and not capable to inherit such an estate. The opinion of the Judges of England³ is [194] founded on the decisions and authority of the law of England exclusively; but in conformity with them the House of Lords decided. Were the principle stated carried into full effect, it would involve the adoption of the rules of the law of England relative to leases to aliens; but this result would be attended with consequences which would practically render the law of Scotland inextricable. *First*, The rules of the law of England are founded on technicalities and explained by judgments so purely English that they could not be embodied with the law of Scotland, in which there is nothing even analogous. *Second*, The substance of that law could not be adopted without regard to its technical rules; for they appear to be inseparable. *Third*, It cannot be deemed that by the Union every rule of English law involving *status* is to be operative in Scotland, as for that doctrine, in itself unsound and impracticable, there is no trace of authority. Were the necessary result of an incorporating union to be that the law of alienage must be the same in the United Kingdoms, the Irish statutes entitling aliens not merely to be lessees but proprietors must have been repealed. But not only have they been permitted to

¹ More's Notes, x. Cra. of L. Kincardine v. Somerdyke, 1683, Mor. 4635.

² Leslie v. Forbes, 1749, Mor. 4636.

³ Leslie v. Grant, 1763, not reported in Court of Session; 2 Pat. 68.

remain in force, but their consistency with the law of the empire appears never to have been doubted. Whenever the question of the validity of a lease to an alien under the common law shall occur in Scotland, the law of England ought to be regarded no farther than as the law of a single foreign country, and the question ought to be decided according to the principle recognised throughout Europe.

In 1844 an Act was passed to amend the laws relating to aliens Art. 2.—
Statutory
right of
aliens
to be lessees. (7 and 8 Vict. c. 66). By the fifth section, every alien friend in any part of the United Kingdom was enabled by grant, lease, demise, assignment, bequest, representation, or otherwise, to take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at [195] elections for members of Parliament, as if he were a natural-born subject.

It must be held that the statute included leases for the purposes of agriculture as well as those for the purposes of trade or manufacture; for "lands" are expressly mentioned, and the generality of the terms "any business, trade, or manufacture," necessarily includes agriculture.

Where a lease is to be made in terms of the statute, it cannot exceed the period of twenty-one years. But by virtue of the fifteenth section, if by the common law of Scotland an alien may be a lessee, a lease not made by virtue of the statute, but at common law, may be of any duration. In dealing practically with leases under the statute, questions of nicety might arise; for example, 1st, Whether, if the state of which the alien is a subject shall cease to be friendly, his right to his lease shall be irritated; and 2^d, Whether, if so, *ipso jure*, or only through a declarator; 3^d, Whether the right of his assignee would continue valid; 4th, Whether a sublease would remain good; and 5th, If so, how the interests of the respective parties could be adjusted and enforced. [By the present law¹ aliens may take, acquire, hold, and dispose of real and personal property of every kind in all respects as natural-born subjects, and transmit a title to such property. But this law does not qualify them for any office, or municipal or other franchise, or confer any right as a

¹ [33 and 34 Vict. c. 14.]

British subject other than those above expressed in regard to property; nor does it affect any estate or interest to which any person has become entitled, mediately or immediately, in possession or expectancy, under a disposition made before the Act, or by devolution of law on the death of any one dying before the passing of the Act.]

Art. 3.—
Denizen.

In England a denizen may be a lessee.¹ Although Bankton denies that denization was known in Scotland previously to the Union,² Erskine not only affirms its existence, but cites instances in which letters of denization were granted.³ No repugnancy to denization existing in the law of Scotland, letters of denization would confer the power of becoming a lessee. But in all probability denization will seldom be resorted to, as by the 7 and 8 Vict. c. 66, the right of naturalisation may be obtained without a private Act, on a memorial presented to one of the Secretaries of State, followed by a certificate to be enrolled in Chancery, and an oath taken by the memorialist.

SECTION VI.—FEMALE LESSEE.

Unmarried
widow.

[196] An unmarried female is capable of being a lessee. Although assignees should be excluded, the lease would not be forfeited upon her marriage; but not falling under the *jus mariti*, although the accruing fruits do, it continues to be vested in herself, and descends to her heirs.⁴

Marriage.

The doctrine that where assignees were excluded, marriage operated a forfeiture, pervaded the law down to a period comparatively recent. Balfour lays down the doctrine, on the authority of decisions, that if a widow marry again without the consent of the lessor, the lease may be reduced, even although there should be a power to assign.⁵ Craig holds that if a liferent lease be granted to a widow, and she marry again, she may be removed, because she cannot, against the will of the landlord, obtrude her husband as tenant, which marriage, being a legal assignation must effect.⁶ On this position it has been justly observed, *first*, That the doctrine had been copied by Craig from the older law, and very unguardedly adopted by him; *second*, That it is inconsistent with the doctrine laid down by himself, that liferent leases can be assigned, from which it follows, that if a direct assignation

¹ Woodf. Landl. and Tent. p. 140.

² 1 Bankt. ii. 63.

³ 3 Ersk. x. 10.

⁴ 1 Bell's Com. 76.

⁵ Balfour, 206, c. xxxi. 27 Nov. 1531, Seytoun v. Ogilvy; 3 June 1538, Kinghorne v. L. Lamington.

⁶ 2 Craig, x. 6.

of a liferent lease be valid, an indirect assignation by marriage cannot be null, and much less create a forfeiture; and *third*, That as marriage could not operate an assignation of a subject not assignable, so, supposing a liferent lease not assignable, all the effect which marriage can have is to bestow the power of administration upon the husband, leaving the lease to subsist in the wife as before.¹

The *dictum* of Stair is "that tacks granted to women full by their marriage, which is a legal assignation, and cannot be annulled; yet may revive by the husband's death being unexpired."² This *dictum*, said to have been copied from Craig,³ contains matter which cannot be extricated; for it supposes, not a decided and conclusive forfeiture, but the successive extinction and revival of the right, making it accrue by turns to the lessor and lessee. On the authority of the *dicta* of Craig and Stair, it was, towards the middle of last century, decided that a lease secluding executors granted to a woman became void upon her marriage.⁴

Notwithstanding the sound observations made by Kames,⁵ Bankton and Erskine appear to have deemed themselves [197] bound by that decision; but in attempting to reconcile it with principle, they involve themselves in palpable error. Bankton, after founding the doctrine of nullity upon the ground that the landlord cannot be compelled to admit the husband, excepts the case where by the marriage articles the *jus mariti* or power of administration is excluded, forgetting that leases do not fall under the *jus mariti*, and that the power of administration by the husband can, in so far as the lessor is concerned, be nowise different from that of a managing steward appointed by the lessee.⁶ Erskine says that as the marriage transfers to the husband the right to the stocking and implements, it must also transfer to him the lease, from which they are inseparable.⁷ In this *dictum* there are two errors—*first*, The assumption that the lease can come under the *jus mariti*; and *second*, The supposition that the *jus mariti* over the stocking cannot be excluded.

Ross adopted the doctrine of Stair.⁸

When in more modern practice the question first occurred, the Court, proceeding expressly on the authority of Craig and Stair,

¹ Obs. by Lord Kames in *Elliot v. D. Buccleuch*, 4 Dec. 1747, Mor. 10,322-3.

² 2 Stair, ix. 28.

³ Lord Kames, *ut sup.*

⁴ *Hume v. Taylor*, 1734, Mor. 7199.

Elch. (Tack) No. 2.

⁵ In *Elliot v. D. Buccleuch*, *ut sup.*

⁶ 2 Bankt. ix. 13.

⁷ 2 Ersk. vi. 31. 2 Ersk. Pr. vi. 13.

⁸ 2 Ross' Lect. 423-4.

Doctrine of
Stair over-
ruled.

reduced the lease.¹ On solemn consideration, the doctrine itself and the reasoning in support of it having been held to be unsound, it was decided, notwithstanding the series of obstant authorities, that a lease having been granted for a term of years to a man and his wife, and the longest liver, and the heirs of the longest liver, but secluding assignees, and the wife surviving and continuing in possession of the farm, the right was not irritated by her subsequent marriage.² By that decision the subsistence of such leases notwithstanding marriage was conclusively fixed.³

Lease to
married
woman.

By the law of England a married woman can be a lessee upon the principle that a lease is always presumed to be beneficial.⁴ The law of Scotland has no repugnancy to their admission as lessees if the consent of their husbands be obtained. No instance has been discovered in which a married woman was the sole lessee. But the same principle is derivable from leases made to the husband and wife, the longest liver, and the heirs of the longest liver.⁵ In them there is a joint tenancy, subject during the husband's life to his sole administration; but when the common interest is severed by his death, the full right accrues to his widow. If, then, a married woman can thus possess the right in a joint form, she may also in [198] a separate one, with full powers, if her husband consent and renounce his right of administration.

The right acquired by a married woman under a conveyance where power to name an heir is granted, or by assignation, with exclusion of her husband's power of administration, involves matter which requires examination. No difficulty can arise on this point if the *jus mariti* over the stocking be excluded. If it be not, an objection, at least in pastoral subjects, might be raised from the stocking belonging to or being at the disposal of a person different from the lessee, and therefore that the right of hypothec might be endangered. No decision has been discovered. The doctrine applicable to the cattle of others taken in to graze does not appear to be in point. As long as the husband permits the stocking to remain, it is by necessary implication subject to the hypothec, and, *e converso*, the lessor cannot void the lease or remove the lessee. Even an irritancy, if the lessee did not possess with his own stocking, would not (it may be deemed) be considered applicable, as it

¹ Home v. Taylor, *ut sup.*

² Gillon v. Muirhead, 1775, Mor. 15,298. [Hailes 631, said to have been affirmed on appeal, but see 3 Pat. 681.]

³ 1 Bell's Com. 76, Note. Bell's Pr. 1318. More's Notes, ccxlviii.-ix. 1 Jurid. Styl. 669. 2 Ersk. vi. 31, Note* 2 Stair, ix. 373, Note (by Brodie). *Per*

Lord Glenlee in Forrester v. Milligan, 1 July 1830, 8 S. 992-4. [Comp. Edmond v. Reid, 26 May 1871, 9 Macph. 782.]

⁴ Woodf. Landl. and Ten. 135.

⁵ Gillon v. Muirhead, and Forrester v. Milligan, *ut sup.*

would be intended to operate only in those cases where the stocking was actually the property of others, and not where it belonged to a party having the same interest as the lessee, and subject to a direct although contingent interest in the latter.

Whether a woman separated from her husband can become a lessee is a question which has not hitherto occurred.¹ The solution of it must therefore depend upon those analogical cases in which a woman so situated has or has not the power of binding herself personally, the nature and extent of which power is governed by the legal class under which the separation is ranged. If the separation be caused by the transportation or exile of the husband as a criminal, which may be regarded as his civil death, or by such desertion as by the law of Scotland forms a legal ground of divorce, she can not only validly contract, but may be subjected to personal diligence.² But, if the separation be of a kind less decided and permanent, although a wife can trade, her liability to personal diligence was at one time deemed to be doubtful. Erskine holds expressly that she is not liable.³ Subsequently it was ruled that a husband having left the country, his wife was liable to personal diligence as an unmarried woman for debts contracted after his departure.⁴ The ratio was that it would be inexpedient to refuse the legal *compulsitor*, because the refusal, by depriving creditors of the ordinary remedy, would injure the credit which might otherwise be given to a woman thus situated. The soundness of that judgment was questioned as adverse to principle,⁵ but the judgment was adhered [199] to in a subsequent case, which has been deemed to have fixed the law.⁶

These principles are directly applicable to the contract of lease. No difference exists between the power of a married woman so situated to enter into the contract of lease and any other contract. Although the subject-matter be land, minerals, or fishings, she is as much entitled to employ it as a source of revenue by the use of

¹ [A woman whose husband has deserted her, that is, has left her without providing her with means of livelihood, and without reasonable cause, may now obtain an order of protection under the Conjugal Rights Acts (24 and 26 Vict. c. 85, s. 1, *seq.*, 37 and 38 Vict. c. 31), which has the same effect as a decree of separation *a mens et thoro*; And the same statute provides that after such a decree of separation, obtained at the instance of a wife, she shall, while separate from her husband, "be capable of entering into obligations, be liable for wrongs and injuries, and be capable of suing

and being sued as if she were not married,"—(§ 6). She can therefore be a party to a contract of lease, and by the terms of the same section she holds any lease devolving on her during her separation free from the *jus mariti* and right of administration].

² Bell's Com. 167, Note.

³ 1 Ersk. vi. 25.

⁴ Churnside v. Currie, 1789, Mor. 6082.

⁵ 2 Bell's Com. 167. 1 Stair, b. iv. 16 (Brodie's Notes).

⁶ Orme v. Difora, 30 Nov. 1833, F.C. No. 30, 114, 12 S. 149.

capital or skill as she is entitled to resort to dealings purely manufacturing or commercial. Nor is any distinction created by the *tractus futuri temporis*, because the same continuousness exists in a contract of copartnership into which she may undoubtedly enter. But her capacity to execute a complete and effective lease will depend upon her being or not being subject to personal diligence. Where she is so subject, she is placed in the same position as an ordinary lessee. Where she is not subject, the contract will be defective in one of its most important parts. But should the lessor think proper to depart from that sanction, the contract will in other respects be obligatory upon both parties.¹

SECTION VII.—MINORS, TUTORS, AND CURATORS.

Lease to
minor.

Minors after pupilarity, with or without curators, are capable of becoming lessees.² While leases to minors are necessarily subject to reduction upon proof of lesion,³ their transactions under those leases, being those of ordinary dealers, must be governed by the same rules which govern the transactions of majors.⁴

How exe-
cuted.

If a minor have no curators, the deed is valid when executed by himself.⁵ If he have curators, execution by himself and their consent are both requisite.⁶ A lease therefore accepted by a minor without the consent of his curators was, if it prejudged him, decided to be as null as if he had alienated without their consent.⁷

Whether
tutor can
acquire a
lease for
pupil?

There is much reason for doubting the power of an administrator-at-law or tutor to acquire by original contract a lease for a pupil. In one case some of the judges thought that it was incumbent upon a tutor to have renewed, had it expired during nonage, a lease, even although of a subject of a fluctuating and precarious nature; while others deemed that because such was its nature, a renewal of it would have been improper. Inferentially, therefore, even the latter appear to have thought that had the lease been one of an ordinary subject [200] the renewal would have been right.⁸ Although the competency of a renewal had been decided (which it was not), the competency of original acquisition would not therefore have been determined, as the acts are very different. Where a lease has by experience been found to be beneficial, or where the withdrawal and new investment of capital may be disadvantageous

¹ [See Note *supra*, p. 207].

² 1 Bell on Leases, 142-3; Hume v. Fish, 1636, 1 B's S. 94; Farquhar v. Campbell, 1828, Mor. 9022.

³ 1 Bell on Leases, *ut sup.*

⁴ 1 Bell's Com. 327.

⁵ *Supra*, c. i. s. ii. p. 85.

⁶ *Supra*, c. i. s. ii. pp. 86.

⁷ 1 Bell on Leases, 143; Seton v. L. Caakieben, Mor. 8939.

⁸ Parkhill v. Chalmers, 1771, Mor. 16,365; *aff.* 1773, 2 Pat. 291.

or doubtful, a renewal may be highly advisable. But the original investment, even in agricultural, and much more in mineral or similar subjects, must always be comparatively hazardous, because of uncertain result. The rule which bars a tutor from subjecting minors to personal responsibility as partners of trading companies, and renders the tutors themselves personally liable,¹ may be deemed applicable. In practice there is little probability that the question will arise, as few tutors will so involve pupils, and few proprietors will accept of such lessees.

The same rule applies with at least equal force to the curators of lunatics or idiots and to factors *loco tutoris*, because their duties being those of preservation, no speculation is admissible.

Although the Court of Session has authorised tutors to renounce, with the consent of the landlord, leases considered to be disadvantageous to pupils,² no instance has been found in which it has given authority to tutors to take leases. The Court refused to interpose in a case of an analogous nature. In an application for the appointment of a *curator bonis* to an insane person, powers were craved to carry on an extensive manufacturing concern. But the ordinary powers only were conferred, and special powers were refused, upon the principle that the manager of the concern must act under full responsibility.³

When this decision is combined with those instances in which special powers of leasing were refused to tutors and other administrators, it might have been deemed improbable that the Court would interfere. But as according to the more recent cases there has been a relaxation of the principle of non-interference, it may be that a different view would now be taken.⁴

The rule that "all rights acquired by the tutor during the subsistence of his office in relation to the pupil's affairs, or wherein he has any interest, are presumed to be for the behoof of the pupil," [201] has been held to apply to leases. At one time it was ruled that a tutor who obtained in his own name a lease of subjects formerly held by his pupil, but which had been acquired after the former lease had expired, and when the pupil had become of perfect

Lease acquired by tutor in his own name.

¹ 2 Bell's Com. 624; 1 Ersk. vii. 16, Note (by Ivory) 208. *Pettigrew v. Wilson* (no date, n. r.). *McAulay v. Rennie*, 15 Feb. 1803, n. r., noticed in Bell's Com. *ut sup.* *Calder v. Downie*, 11 Dec. 1811, F.C. 390.

² *Meikle v. Meikle*, 1823, 2 S. 274. *Cockburn's Tutor v. Cockburn*, 1825, 3 S. 642. *Warden*, 1839, F.C. 178, 8 S. 208, *et al.* 1 D. and A. 266, and 2, 109. [Turner, 1 March 1863, 24 D. 694.

Robertson, 14 Jan. 1841, 3 D. 345. *Grahame*, 10 Dec. 1857, 14 D. 312. *McEwan*, 17 Dec. 1852, 2 Stuart 137. *Blyth v. Craig*, 1808, Hume 889. *Forman's Tutors*, 1805, ib. 888.]

³ *Philip, Pet.*, 22 Nov. 1827, 6 S. 103. ⁴ *Supra*, c. iv. s. iv. p. 183. [Accot. of Court v. *Gilray*, 21 May 1872, 10 Macph. 715.]

⁵ *More's Notes to Stair (Tutary)*, xxxix.

age, was found not accountable for the profits.¹ This judgment may be deemed to have been rested on the special matter created by the pupil having become of age before the lease was renewed, and therefore that the tutor was not subject to the responsibility under which he would have been had he taken the lease in his own name during the pupillarity or minority. The principle of responsibility was not deemed to be affected by this decision, for in a subsequent case it was held to be in full operation. The father of pupils having died in possession of a considerable farm, a tutor-dative was appointed. The tutor, apparently with the approbation of those connected with the pupils, entered into a bargain with the proprietor, by which, after renouncing the subsisting lease, of which there were two years to run, he obtained a new one for fifteen years in his own name at an advanced rent. This sum, during the two years of the former lease, he became bound to pay to his pupils. While there were four years of this second lease to run, and while the children were still under his care, he obtained another lease for thirteen years on a further advance of rent. The tutor having in this way acquired money, an action was brought by his wards to oblige him to account to them for the profits arising from the leases, and it was decided that he was obliged so to do.²

SECTION VIII.—JOINT LESSEES.

Art. 1.—
Joint Lease
in name of
Individuals.

A joint lease creates a *pro indiviso* right and *pro indiviso* liability in each of the lessees.³ In consequence, there is vested in each the power of insisting that there shall be joint possession and joint management, although the subjects be partly agricultural and partly mineral.⁴ Each is liable *in solidum* for the rent, and for the performance of the other prestations, even by possession, in consequence of tacit relocation after the expiration of the lease.⁵ Nor [202] does the non-occupation and absence of one exempt him from liability for the non-observance of the prestations, while the subject was occupied by the other.⁶

Construc-
tion of Do-
mination.

The destination in a joint lease is to be construed favourably for the lessees. Although therefore there should in the deed be

¹ Parkhill v. Chalmers, *ut sup.*

² Wilsons v. Wilson, 1759, Mor. 16,376. [Comp. Cochrane v. Black, 1 Feb. 1854, 17 D. 321, 337; Guthrie's Bell's Pr. 1898 (13), and 2084 (12); Fraser's Pa. and Child, 279, *seq.*]

³ Douglas v. Graham, 1566, Mor. 4235. Gray v. Rollock, 1570, Mor. 4246. Lidderdale, 1627, Mor. 4247.

Brown v. Paterson, 1704, Mor. 14,629. Sutherland v. Robertson, 1736, Mor. 13,979. Dickson v. Dickson, 10 July 1821, 1 S. 113; and *Id.* v. Eund, 8 July 1823, 2 S. 462.

⁴ Dickson v. Dickson, *ut sup.*

⁵ Brown v. Paterson, *ut sup.*

⁶ Sutherland v. Robertson, *ut sup.*

a mistake as to the name of one of them, the lease will be good, if it shall be proved who really was the person intended. A lease had been granted to A for twenty-one years, and after the expiration of that period, during his own life and that of his eldest daughter B, and the longest liver, in case either should survive the period of twenty-one years. B predeceased her father, but upon his death, it having been proved that B had been by mistake put as the eldest daughter, and that C really was so, C was held to be entitled to the possession of the whole farm.¹

There is a difference in the legal effect of a joint lease, as it shall be taken, *first*, to the lessees and their heirs; or *second*, to the lessees, the longest liver, and their heirs;² or *third*, to the lessees in conjunct fee and liferent, and to their heirs.³

1. If the lease be of the tenor first mentioned, each lessee (one case excepted) has during life an equal interest both in kind and in degree, and upon the death of either his right devolves, not to the survivor but to his own heirs.⁴ By an old decision, not subsequently overruled, it was determined that although a lease granted conjunctly to a father and his legitimate son is understood to import that the father is liferenter of the whole, and his son to succeed him after his decease, yet this rule applies to no other persons to whom a lease is conjunctly granted, however near be the relationship. Where, accordingly, the lease was to a mother and son, the Court found such assedation to make equal right "to them that are conjunctly named in the same."⁵ In accordance with the same rule, it was decided, that where a lease had been granted to the lessees themselves jointly, and "to their heirs and successors whomsoever," the heir of the lessee predeceasing was entitled to succeed to his share, and consequently to the joint possession and management.⁶

Lease to joint-lessees and their heirs.

The effect of a lease to a husband and wife, their heirs and assignees, without insertion of the longest liver, must as a general point be considered as still undetermined. In a very old case it was decided that under such a lease the wife, after the husband's death, was entitled to "constitute any person, at her pleasour cessionary and assignay," to the exclusion of all her husband's heirs,

¹ Moore v. Boddan, 1823, 2 S. 563.

² 1 Bell on Leases, 146-8.

³ 1 Bell's Com. 64.

⁴ Bell on Leases, *ut sup.* [See Macvean v. Macvean, June 4, 1864, 2 Macph. 1120, as to the proof of allegations that a joint lease was taken for the benefit of one only of the joint-tenants—which resolves into a proof of

trust, and must therefore be by writ or oath; and allegations as to the amount of their respective interests, which is a question of partnership and appears to admit of proof by parole or facts and circumstances.]

⁵ Douglas v. Graham, *ut sup.*

⁶ Dickson v. Dickson, *ut sup.*

except [203] those of his body.¹ In a comparatively recent case (no intermediate one having been discovered) it was ruled upon the special matter that a lease to a husband and wife, their heirs and assignees, was not vested in the husband, but jointly in the spouses. The more important special matter consisted, *first*, of the description of the lessees, viz., the husband, and his wife *nominatim* with her husband's advice and consent; *second*, of the destination to the spouses by name, their heirs, assignees, and subtenants; *third*, of their obligation to pay the rent and to perform the other prestations; and *fourth*, of the wife's ratification of the lease in presence of a magistrate.² It was said that the special circumstances seemed to take the case out of the general rule by which a feudal right or subject granted to a husband and wife and their heirs is held to be in the husband; and that it might be questioned whether the Court had ever applied that rule of construction to a mutual contract of lease.

Examining the question as one which is open, the doctrine of the older decisions must at once be rejected, because the terms do not confer upon the wife any right superior to that of the husband. Although in the modern case the general point was not determined, the tendency is obviously against applying to leases the rule applicable to feudal property. Nor does there exist any reason for including leases under that rule, which is founded upon the maxim that, as a fee cannot be *in pendente*, it must be either in the husband or the wife, and therefore that it is in the husband, as being the *persona dignior*. A lease, although made real by statute against singular successors, is merely a personal contract, conveying no property to the lessee, but only a right of possessing for a certain rent; and, for that reason, there is nothing in law to bar a lease to be granted to two conjunctly, neither of whom has the power of disposal without the consent of the other.³

Lease to two
lessees and
the sur-
vivor and
their heirs.

2. If the lease be granted to joint lessees and the longest liver and their heirs, the right is equal during their lives, and accrues to the survivor. Each during his life is vested with a right so qualified, that were he to assign his portion the assignation would terminate with his life, when the survivor acquires the sole right.⁴ In consequence, a lease having been granted to a father and his illegitimate son conjunctly, and the longest liver of them two and their assignees, it was decided that it could not be disposed by the

¹ Quhyte v. Brown, 28 July 1561; Belf. (Assesation) 201, c. vi.

² Forrester v. Milligan, 1 July 1830, 8 S. 922.

³ Per Lord [Elchies in Lord Boyd v.

King's Adv., 1749, Mor. 4205, 2 Bankt. ix. 29.

⁴ 1 Bell on Leases, 147-8. 2 Ross' Lect. 487.

father to the prejudice of the bastard, except for the father's lifetime [204] and for his own part.¹ Where a lease was made to a father and his son and the longest liver of them and their heirs, it was ruled that they were conjunct lessees; that the profits divided betwixt them during their joint lives; and that after the death of the one the whole belonged to the survivor.² Bankton says that after the decease of both it goes to their heirs equally.³ But this doctrine is not warranted by authority, for, in the case upon which it is apparently founded, the whole was held to accrue to the survivor.⁴

The ancient law is at variance with the modern with relation to the effect of joint leases to a husband and his wife, and the longest liver, and their heirs and assignees. Of old, a lease of that tenor was held to vest the wife with a life-interest only, so that she could not after the death of her husband "make assignation longer than her lifetime to the prejudice of the heir."⁵ But this decision has subsequently been overruled. A lease having been taken to a husband and wife, "and the survivor of them, and their heirs and executors," it was decided that the right to the lease was in the wife as survivor, and that it accrued to her heirs.⁶ In conformity, a lease granted for a term of years to a husband and wife, the longest liver, and the heirs of the longest liver, secluding assignees, was held to belong to the wife.⁷ [A lease for a definite period to a husband and wife, and the longest liver, "whom failing," to their son N, he being a party to the lease, and his heirs and assignees, gives N a right to take on the death of the survivor of his parents, which cannot be defeated by a sub tack to endure beyond that survivor's life, for N's right is not a gratuitous substitution which the father can disappoint, but a part of the contract.]⁸

A doubt has been suggested (necessarily affecting each form of the transaction) of a husband's power to revoke a lease granted jointly to himself and his wife.⁹ But that power, comprehending only *donationes intra virum et uxorem*, seems inapplicable to a deed which (as does a lease) emanates from a third party, and which contains counter obligations in his favour. A donation is secure

¹ Gray v. Rollock, *ut sup.*

² Lidderdale, 1627, *ut sup.*

³ Bankt. *ut sup.*

⁴ The case referred to by Bankton is *Lauderdale*, 10 June 1627. No such case having been discovered, it would seem that the case really intended is that of Lidderdale, noted above.

⁵ Rig v. Tenants of N., 1561, Mor. 4197, Balf. Asseda. 201, c. vii.

⁶ Lord Boyd v. King's Advocate, *ut sup.*

⁷ Gillon v. Muirhead, 1775, Mor. 15,286.

⁸ [Macalister v. Macalister, 23 Feb. 1859, 21 D. 560.]

⁹ Per Lord Glenlee in Forrester v. Milligan, *ut sup.*

against revocation if it involve even gratuitous stipulations in favour of a third party.¹ *A fortiori*, therefore, ought a joint lease to be irrevocable, because in it, independently of the interest of either of the spouses, there is created in the lessor an interest to enforce the contract as originally made.

Lessee to husband and wife and the survivor.

3. Where a lease was granted to a husband and wife and the survivor of them, it was decided that the lease belonged to the survivor, although the marriage was dissolved by divorce and the survivor was the guilty party.²

Lessee to two in conjunct fee and life-rent and their heirs.

[205] 4. If a lease be made to two or more "in conjunct fee and life-rent and to their heirs," the right of each is not only a right *pro indiviso*, but is burdened with the eventual life-rent of the other, so that it can be assigned or adjudged only under that qualification.³ The propriety of applying those terms to a lease may justly be questioned, because the term "fee" implies property from which the right of a lessee is legally different. But when they were used, the rule applicable to property was applied to a lease; where the landlord's right, as assignee of one of the tenants, was restricted on the cedent's death; the other, as life-renter, acquiring right to the whole.⁴

Lessee to two and the survivor and the heirs of the survivor.

5. A farm was let to two tenants and the survivor of them and the heirs of the survivor. For their own convenience the tenants divided the farm, and each paid the rent and the public burdens corresponding to the half which he occupied. One of them assigned his right under the lease to his nephew, and he died soon afterwards. The assignee continued in possession for more than a year and paid his share of the rent, and his name was entered as joint tenant in the landlord's rental book. The possession of the assignee, and the deletion of the cedent's name from the rental-book, and the substitution of the name of the assignee, which was averred to have been in the knowledge of the joint tenant, were pleaded as importing homologation or acquiescence by him of the assignation. It was held that the assignation could not subvert the rights of the joint tenant, he having been no party to it, and that the acts alleged did not constitute homologation or acquiescence, and were in no wise such as to prevent him from having right to the lease as sole tenant under the clause of survivorship.⁵

¹ 1 Stair, iv. 18. 1 Ersk. vi. 20. Hialeid v. Lindsay, Dec. 1691, Mor. 6087, 6106. Clerk v. Sharp, 1717, Mor. 5996.

² More's Notes, ccl. C. of Argyle v. Tenants of Dollar and E. Argyle, 1673, 723. roM

³ 1 Bell's Com. 64.

⁴ Brown, 1789, cited in Note 3 to 1 Bell's Com. 64.

⁵ Robertson v. Menzies, 10 March 1857, 19 D. 667, 99 Jur. 808.

Companies may be lessees of urban tenements, manufactories, mines, fishings, or other subjects fitted for commercial transactions; and such cases are of daily occurrence. But leases to companies for purposes purely agricultural have hitherto been unknown, although occasionally agricultural subjects, as useful appendages, are leased along with those of the other descriptions.

A lease for behoof of a company may be granted in the names of the individual partners.¹ A lease can also be validly granted to a company *socio nomine*.² But a distinction exists between a [206] company trading under what is termed a proper firm, consisting of the names of individuals, and what is termed a descriptive name, as the "Arran Fishing Company," or "Shotts Iron Company."³ In the former case the destination of the lease to the social firm and execution by that firm will be valid. But in the latter the doctrine has been deemed to be that the name cannot be subscribed or used by any of the partners as a firm to bind the company.⁴ But it has been said that there seems to be no bar to prevent a company so constituted from authorising their directors or any individual to sign and contract so as to bind them.⁵

Leases to companies are often complicated with questions incidental to the existence of the company as a person separate in law from the individuals of whom it consists—as, *first*, what is the nature of the right acquired to the company by assuming the character of lessee? *second*, through whose act can the company assume that character? *third*, for whose benefit is it assumed? and *fourth*, by what rule is its subsistence to be determined?

1. Leases form a part of the common stock of the company.⁶ In consequence, they are held by the partners for their joint use, are liable for the partnership debts, and may be sold for the common purposes.⁷

2. As leases may be granted to the social firm, any partner (in the absence of a known contrary stipulation) can bind the company as lessees. But conformably to the received rule applicable to the powers of partners, the lease must be of such a kind as to come within the nature of the trade pursued by the company.⁸ The

* [On the subject of this article, see Clark on Partnership, pp. 170, 215, 364, 667, 679, &c.]

¹ Murray v. Hogarth and Co., 12 Feb. 1836, F.C. 263, 13 S. 453.

² 1 Bell on Leases, 149-50. Bell's Pr. 367. More's Notes, cl. Menzies' Lec. 825. Denniston, Macnair & Co. v. Duncan Macfarlane, 1808, Mor. App. (Task) 15.

³ 2 Bell's Com. 627.

⁴ 2 Bell's Com. 629. Bell's Pr. *ut sup.*

It has been well said (More's Notes, *ut sup.*) that the doctrine which gives this result ought to be reconsidered.

⁵ Bell's Com. *ut sup.*

⁶ 2 Bell's Com. 612.

⁷ Bell's Com. *ut sup.* Crawshaw v. Maule, 1818. 1 Wilson, 181.

⁸ 2 Bell's Com. 617-18.

Art. 2.—
Lease to a
Co-part-
nery.*

Leases to
company are
part of com-
mon stock.

How a com-
pany be-
comes
lessee.

partner of a manufacturing, fishing, or mining company could not, for example, oblige the company as lessees for an agricultural subject unless it were proved that the transaction had been applied to the benefit of the company. It has been said that as entering into a contract of lease is not an ordinary act of administration, the deed ought to be signed, not by the company firm, but by the individual partners.¹ For this *dictum* no authority is given. But *first*, it is erroneous in principle, because a lease, not coming under the rules of feudalism, and being as much an instrument of trade as the subject-matter of any other contract of location is, the acquisition of it must be equally within the powers of each partner; and *second*, the *dictum* is contradicted by the decision that leases can validly be granted to a company *socio nomine*,² because if they can be granted to the firm they can be accepted of under the firm.

Lease acquired by parties may accrue to company.

[207] 3. All leases must accrue to the common stock. If therefore a lease be upon the point of expiration, a partner cannot, by effecting a dissolution of the company, secure to himself the benefit of that lease.³ And if a member of a partnership dissoluble at pleasure obtain a renewal of a lease of part of the partnership premises, such lease belongs to the partnership.⁴

Effect of dissolution.

4. The character of the company as lessee being commensurate with the subsistence of the partnership, must terminate with its dissolution. Bankruptcy therefore (if assignees and subtenants are excluded) by dissolving the company terminates the lease.⁵ Dissolution by death, mutual consent, or any other cause, must produce the same effect.⁶

If any part of the term of a lease granted to a company is unexpired at the dissolution of the partnership, it is partnership estate, and is to be distributed as such.⁷ Where, therefore, a company has been dissolved, and the partners cannot agree as to the disposal of the lease of the premises in which they carried on trade, it is to be exposed to sale.⁸ The rule applies, though the lease be not taken *socio nomine*, if it be for the common benefit.

¹ 1 Bell on Leases, 149-50.

² Denniston, Macnair, & Co. v. Macfarlane, *ut sup.*

³ Bell's Com. 632.

⁴ 1 Montague on Partnership, 96-7. Featherstonehaugh v. Fenwick, 17 Ves. jun. 298. ⁵ 2 Montague on Partnership (cases), p. 342-62. Collyer's Law of Partnership, 120-1.

⁶ 1 Bell's Com. 82. More's Notes, cclxviii. 1 Bell on Leases, 150. Campbell v. Calder Iron Co., 11 Dec. 1806, cited in Bell's Com. *ut sup.*

⁷ In Gillespie v. Clark, 1881, 1 S.

160, the general point was made that a lease was terminated by the dissolution of the company. But as another point, mentioned *supra*, c. iv. a. ii. p. 169, also occurred, and the report merely bears that the Court passed a bill of suspension to try the question, it is uncertain which question it was thus intended to try.

⁸ Per Sir William Grant, M.R., in Featherstonehaugh v. Fenwick, *ut sup.*

⁹ 2 Bell's Com. 631, note; 632, note. Marshall v. Marshall, 23 Feb. 1816, F.C. p. 101.

Where, consequently, the partners of a company in the prosecution of its business have obtained a lease in favour of themselves individually, and their assignees or sublessees, and the company is afterwards dissolved by the death of one of the partners, the survivor is bound to concur with the representatives of the deceased in a sale of the lease as a part of the company stock.¹ And, on the same principle, a lease having been taken in the joint names of two individuals with the view of entering into a partnership, but that purpose having been broken off, it was decided that one of the parties was not entitled to resist an application for sale of the lease and for his removal from the premises.²

Mention was formerly made of mutual leases entered into by the proprietors of coal, salt-works, and similar subjects, combining the contract of lease with the contract of copartnery.³ The law applicable to the parties to those transactions, when considered as lessors, applies to them conversely when considered as lessees.

[208] Corporations, civil, religious, or charitable, and all public administrators, where there is no limitation of their powers by statute or their deed of constitution, may become lessees, subject *e conversis* to the same rules of good administration which control them as lessors.

Art. 2.—
Lease to
Corporations or
other Public
Administrators.

Corporations have the same capacity as individuals have to become lessees. But in making leases to them it will be equally necessary, as in taking leases from them, to ascertain what officers have the power of binding them, and to take care that the transaction is within the limits of that fair administration prescribed to corporations in the management of the common fund.⁴

The tenor of the Statute of the 18 and 19 Vict. c. 88 (14th August 1855) Dwelling-houses Act, has been detailed as applicable to lessors.⁵ In so far as tenants in the ordinary sense are involved, no statutory peculiarity seems to emerge. But, as formerly observed, the statute creates a class of parties hitherto unknown to the law of Scotland. Throughout numerous sections provisions are dealt with by which a tack or rental-right, without an ish and for perpetuity, may be granted, which is styled disposing in tack or rental-right. The relative provisions have been already stated in substance,⁶ and for *minutiae* the statute itself must be carefully consulted. What is the legal import of "disposing in tack or

Art. 4.—
Tack under
the 18 and
19 Vict. c.
88.

¹ Aitken's Trs. v. Shanks and Weddel, 18 May 1830, F.C. 594, 8 S. 753.

² McWhannel v. Dobie, 12 June 1830, 8 S. 914, 3 D. and A. 131.

³ *Supra*, c. ii. s. iii. pp. 129, 130.

⁴ *Supra*, c. iii. s. v. p. 146, *seq.*

⁵ *Supra*, c. iii. s. vii. p. 161.

⁶ *Supra*, *Ib.*

rental right"? whether the grantees are to be dealt with as donees or as lessees? and what are the results of this combination of legal characters hitherto deemed irreconcilable? form questions which have not yet been put to the test, and as to the determination of which it would be difficult even to indicate an opinion. For the right is so anomalous that in dealing with it the Courts must divest themselves of all recognised rule and analogy, and be governed exclusively by what they deem to have been the intention of the Legislature in the creation of the right.

CHAPTER VII.

HEIR OF LESSEE.

SECTION I.—SUCCESSION AB INTSTATO.

Art. 1.—
*Heir Single
and Major.*

[209] Leases having hitherto been deemed *stricti juris*, have been construed upon the principle that the granter conveys no right which is not expressed.¹ The doctrine of *delectus personæ* was introduced to prevent persons of power or influence obtaining possession, and retaining it against the lessee's will.² By reason of the *delectus personæ* the heir of the lessee if not mentioned did not succeed in the lease. Although the ancient reason of the *delectus* had gradually ceased, there remained the doctrine itself, founded upon the presumption of a preference arising from the superior pecuniary credit and agricultural qualifications of the lessee and his good and peaceable dispositions and habits.³

*Delectus
personæ* formerly held
to exclude
heirs.

The doctrine of *delectus* continued consequently to operate the exclusion of the heir.⁴ Of the lawyers of the seventeenth century Stuart alone held a contrary doctrine.⁵ Bankton speaks doubtfully of the right of the heir;⁶ and so late as the middle of last century the case was deemed new by the Court. The question arose, how

¹ 2 Craig, x. 3. 2 Stair, ix. 26. 2 Bankt. ix. 11 and 17. 2 Ersk. vi. 31. 2 Ross' Lect. 482. 1 Bell on Leases, 146. A doubt may well be entertained as to the permanency of the doctrine that leases are to be deemed *stricti juris*. The subject shall be examined in detail hereafter, B. V. c. i.

² Introduction, c. vii. p. 58.

³ 2 Ersk. vi. 31. 2 Ross' Lect. 482.

1 Bell's Com. 75-6. 1 Bell on Leases 152. Alison v. Proudfoot, 1783, Mor. 15,290.

⁴ 2 Craig, x. 6 and 7. Little v. Lintoun, 1579, Mor. 10,319. Doune v. Niven, 1609, Mor. 10,320. A v. B, 1612, Mor. 10,320.

⁵ Stuart's Ana. to Dirl. 413.

⁶ 2 Bankt. ix. 30. 2 Ross' Lect. 482.

far a lease of a manufacturing subject for the term of fifteen years descended to heirs although not expressed.¹ The Sheriff decreed the heir to remove at the instance of a purchaser. A bill of suspension of the decree was refused by the Lord Ordinary. On advising a petition and answers, it having been observed that the interlocutor of the Sheriff was agreeable to the only decisions on record, which were two about a century ago, and there being no decision since, it might be considered as a new case, the Lords, without declaring any [210] opinion on the point, remitted to the Lord Ordinary to pass the bill.²

Although this cannot be deemed to have been a formal judgment sustaining the right of the heir, yet the law has ever since been held to be fixed.³ It has been said that although no decision regarding this point appears in the printed reports, it seems now to be held that in such a case the lease will descend to the heirs of the party agreeably to the maxim *qui providet sibi providet heredibus*.⁴ In a case comparatively recent, concerning the right of the heir of an assignee of a lease to succeed although not mentioned in the deed, the Court considered the law as settled in favour of the tenant's heir in the case of a tack where heirs are not mentioned, and they did not see cause to distinguish between that case and the case of the heir of an assignee.⁵ This decision must be deemed expressly to give the full weight of judicial authority in favour of the recognised doctrine.

It is now therefore an established rule that, although not named, heirs succeed, and *in vice* of the original contracting party become entitled to all the rights and become subject to all the prestations stipulated for in the lease.⁶ The order of succession is the same as in other heritage.⁷ And a notion adopted in some of the older Books⁸ that leases of a shorter duration than nineteen years should devolve to executors, although approved of by a modern authority,⁹ was never admitted in practice, and has been exploded in theory. But a lease devolves to the heir of line, not to the heir of conquest, because the latter can succeed to those rights only which are capable of sasine.¹⁰

¹ Thomson v. Watson, 1750, Mor. 10,337. Elch. Tack, No. 16. ² Ersk. vi. 31, Note f.

³ Thomson v. Watson, *ut sup.*

⁴ Bell's Pr. 1219.

⁵ More's Notes, cxlvii.

⁶ Telfer v. McDougall, 1811, Hume 867.

⁷ ⁸ 2 Ersk. ii. 6, and vi. 31. ⁹ Ross' Lect. 483. ¹ Bell's Com. 76. ¹ Bell on Leases, 146 and 508. ² Stair, ix. Note

vi. (by Brodie). ¹ Sandf. on Herit. Suc. 34.

¹ 3 Stair, iv. 33. ³ Ersk. viii. 3-12. ¹ Sandf. on Herit. Suc. 2-8.

⁶ Dirl. and Steu. 136.

⁸ 2 Ross' Lect. 483.

¹⁰ Hope's Min. Pract. t. iii. s. 48; 3 Stair, v. 10; 3 Mackenz. Inst. viii. 12; 3 Bankt. iv. 21; 3 Ersk. viii. 16; 1 Bell on Leases, 509 and 511-12; 1 Sandf. *ut sup.* Heirs of E. Dunbar, 1625, Mor.

Right of
heir now
fixed.

Existing
rule.

Lease to
two, their
heirs and
assigns.

Where a lease is granted to two tenants and their heirs and successors, the heir of the tenant who dies first is entitled to continue the joint possession with the survivor.¹ But where a lease not secluding assignees and subtenants is granted for a term of years and a lifetime to a person and his heirs, it is the life of the principal tenant in possession at the expiration of the term, and not the life of the person deriving right from him (on payment, not of a surplus rent, but of a grassum) and in the natural possession, that regulates the duration of the lease.²

[211] The succession in rental rights is peculiar. But the details shall be discussed hereafter in considering the valid duration of those rights in questions with singular successors, either when heirs are or are not mentioned.

Art. 2—
Heirs-Portioners.

As heirs-portioners succeed equally to those rights which are divisible, so where a right can neither be taken by the eldest as a *præcipuum* nor be divided, it must continue to belong to all of them *pro indiviso* as representing their predecessor. Among rights of the latter class there must be ranked leases, which constituting *ex contractu* an indivisible subject in the original lessee, must so remain in his heirs. Heirs-portioners therefore must possess as would a single heir, all being jointly entitled to the rights and jointly subject to the obligations of the lessee.³ The right of heirs-portioners to succeed to a lease was recognised in a comparatively recent case.⁴

The question has been raised whether a lease granted to a person and his heirs would expire in whole or in part upon the death of one of the heirs-portioners?⁵ A lease was granted to heirs and assignees for fifty-seven years and the lifetime of the lessee, and [212] if he predeceased the definite period, for the lifetime of his heirs. The original lessee having assigned, died before the expiration of the fifty-seven years. When those years expired, two of his daughters were living. The elder having died, the landlord sued the tenant to remove from the whole farm, as the lease had expired by the death of the elder sister, or at least to remove from one-half

5605. *Ferguson v. Ferguson*, 1683, Mor. 5605. [Conquest is now abolished.]

¹ Bell's Pr. 1219. *Supra*, p. 211.

² More's Notes, ccli. *Ronaldson, Pet.*, 18 Dec. 1812, F.C. 49. In *Pratt v. Abercrombie*, 18 Nov. 1853, 21 D. 19, 31 Jur. 9, an opinion is reported to have been indicated that a lease in favour of the tenant and the heirs of his body, "secluding heirs-portioners," descends to the tenant's eldest daughter. [See

Crichton v. Lady Keith, 11 March 1857, 19 D. 713.]

³ Bell's Pr. 1219. Assumed in *Deuchar v. Lord Minto*, 1798, Mor. 15,295. *Cunningham v. Grieve*, 1803, Mor. 15,298. *Louden v. Adam*, 1805, Mor. Tack, App. 10.

⁴ *Young v. Gerard*, 23 Dec. 1843, 6 D. 347, 16 Jur. 184.

⁵ 1 Sandf. on Herit. Suc. 26-8.

of the farm to which the deceased heir-portioner had right. In the inferior Court the action was dismissed on the ground that as long as one heir-portioner survived the lease must subsist. But on advocacy a judgment was given by the Lord Ordinary that the liferent right to the lease devolved to the two sisters as heirs-portioners of their father; that one-half of the lease was vested in each of them, and that upon the death of the elder the lease was, as to her half, terminated. The judgment, by reason of a compromise, was not reviewed by the Court.¹

On this case it has been observed that the *pro indiviso* share of each heir-portioner descends to her heirs; but if such heirs-portioners succeed as liferenters in a lease provided to a man during his lifetime and that of his heirs, this seems to be limited to the life of his immediate heirs, and so the death of one of the heirs-portioners will put an end to her *pro indiviso* share instead of giving the succession to the survivor, who can only take as her heir.² This observation may be questioned. *First*, the lease did not terminate by the death of the elder sister, because, not devolving to her as *præcipuum*, its duration did not depend upon her life; and *second*, there was not expiration as to a half, because the subject-matter of the contract being one in the original lessee, continued so to be while his representation subsisted, which it did as much while one as while both heirs-portioners lived.³

Although the heir be a pupil or minor, he succeeds, and therefore the subject-matter of the lease must, as must his other rights, be under the care of his tutors or curators. Should they themselves be incapable of managing, there does not appear to be any bar to the appointment of a manager by them.

Art. 3.—
Lease
devolving to
Minor
Heir.

It has been said that when assignees and subtenants are expressly excluded, a judicial opinion has been entertained that the lessor would be entitled to object to the appointment of a permanent manager, who, in place of accounting for the produce, should stipulate to pay a fixed annual sum to the minor.⁴ The soundness of this doctrine may justly be questioned, [213] because, *first*, the appointment of a manager is neither an assignation nor a sublease; and *second*, as the duration of the manager's appointment and the

¹ M. Tweeddale v. Dods, 14 June 1831, n. r., cited in 1 Sandford on Herit. Suc. 28.

² Bell's Pr. 1219.

³ Sandford, l. c.

⁴ 1 Bell on Leases, 172-4; Boyd v. Alexander, 29 June 1802, not reported, but cited by Bell, *ut sup.* It was an

action of removing, in which, while the judgment proceeded chiefly on other grounds, the Court is said to have given much weight to alleged disapprobation by the lessor of the plan stated in the text. [See below, p. 204, and Irvine v. Lyon, 13 Feb. 1874, 1 Rettie 512.]

mode of settlement are matters between him and the tutors, which the lessor cannot interpose to regulate, the permanency and the fixed annual return are *quoad* the lessor *res inter alios actæ*, and to which consequently it is *jus tertii* for the lessor to object. The right of tutors to act by means of a manager under whatever regulations they may deem proper, is sanctioned by the reasons which ruled the decision that a lease, although excluding assignees and sublessees, may be assigned by the tenant to his eldest son.¹

Art. 4.—
Right of
Donatary of
the Crown
under a Gift
of Ultimus
Hæres or
Bastardy.

A major or minor, a single heir or joint heirs, may acquire a lease by a gift of *ultimus hæres* or bastardy, by virtue of which possession is attained *in vice* of the Sovereign. In one case, where a lease granted to a bastard secluded his assignees and subtenants, the Court was of opinion that, even where no mention has been made of assignees and sublessees, the King, coming in place of the lessee *ob defectum hæredis*, could not transfer the right to a donatary, and therefore decided that the lease did not devolve to the donatary.² The judgment consequently was rested upon the principle, and not upon the clause of seclusion.

But as the judgment stands alone, it cannot be deemed to have so fixed the law as to exclude further question. Doubts of its soundness are warrantable, because where the heirs of a legitimate person fail or a bastard dies without lawful issue, the King is heir in the most full and strict sense, having all the rights and being liable for his debts to the amount of the property.³

Stair is of opinion that the right of the Crown is not that of proper succession, but of caducuary confiscation burdened with the debts of the person deceased.⁴ This opinion is at variance with that contained in the other Books, and must now be deemed to have been wholly overruled by the decisions that the donatary of the Crown, on a gift of *ultimus hæres*, is entitled to sue [214] a reduction *ex capite lecti*.⁵ Nor is the doctrine of the Crown's right of succession impaired by the decision that the Crown is not universal heir of provision, and therefore cannot take under a conditional institution to heirs; for it was there held to be law that

¹ Hepburn v. Burn, 1759, Mor. 10,409.

² Falconer v. Hay, 1789, Mor. 1355.
More's Notes, xxxiii.-iv.

³ Reg. Maj. l. ii. c. 52. Note by Skene, "Rex succedit Bastardo;" and c. 55, s. 16, Note "Ultimi hæredis." Balfour 237-8. Skene, *de sig. verb. voce* Bastard. 1 Craig, xvi. 30 and 37. 3 Mackenzie, Inst. x. 1-4. 5 Wallace, v.

397. 3 Ersk. x. 245. Goldie v. Trs. of Murray, 1753, Mor. 3183. Brock v. Cochrane, 2 Feb. 1809, F.C. 150.

⁴ 3 Stair, iii. 47, and iv. 13. [Bell's Pr. 1669.]

⁵ Goldie v. Trs. of Murray, and Brock v. Cochrane, *ut sup.* 3 Ersk. viii. 100. Notes † and (by Ivory) 557.

the right of the Crown is not restricted to heirs of line, but includes any heir *alioqui successorus*.¹

But the power of devolution to a donatary is indispensable towards rendering the right of the Crown effective. Where the King succeeds to feudal property which holds of a subject-superior, he gifts it, because he cannot be the vassal of a subject; and upon completion of the gift by a decree of declarator, letters are issued charging the superior to receive and infeft the donatary as his vassal.² This rule applies by a close and decisive analogy to leases; for as the King can no more be at common law³ the lessee than he can be the vassal of a subject, his right of succession would be nugatory if he could not convey to a donatary; and, in consequence, leases would revert to the landlord, and never could be included under gifts. But in practice they always were included, even at a period when the principle of *delectus personæ* was rigidly upheld.⁴ Where a lease (it has been said) has been let for three lives and nineteen years certain thereafter, it will be good to the donatary under a gift of *ultimus hæres*, at least for the nineteen years; and if the three lives should be taxed to three nineteen years, the reckoning seems reasonable.⁵ This is an explicit recognition of the power of the Crown, not only to grant a donatary, but to his heirs, or to successive donataries; for so the right to continue the survivances necessarily implies.⁶

SECTION II.—SUCCESSION BY DESTINATION OR SETTLEMENT.

A lease may contain *in gremio* a destination to another than the heir-at-law as to the heir-male or any other person nominated; for the lessee is thus entitled to regulate his succession. The terms of the lease have in themselves been held to be conclusive as to the existence of the exclusion or non-exclusion of the heir-at-law. A lease was granted to A and his heirs-male for nineteen years, and thereafter for the life of B, his second lawful son, to whatever [215] period of years the said B's life shall extend. The eldest son of A predeceased him, leaving a son C. B had always lived with A upon the farm, and after A's death continued to possess as

Art. 1.—
*Destination
embodied in
the Lease.*

Dunn v.
Dunn.

¹ Torrie v. Munzie and King's Remembrancer, 31 May 1832, F.C. 462, 10 S. 597.

² 3 Ersk. 1. 3, and to be inferred from 3 Mackenzie, Inst. 1. 1.

³ The qualifying words "at common law" have been inserted, because by virtue of certain statutes detailed *supra*, c. iii. s. 1, p. 132, the Crown, through its commissioners, may hold a lease.

⁴ 1 Dallas, part. ii. pp. 18-20.

⁵ Dirl. and Steu. 121.

⁶ *Supra*, c. vi. s. 2, Note 6, containing queries concerning the rights and powers of the Commissioners of Woods and Forests relative to leases devolving to the Crown as *ultimus hæres*.

tenant, under the belief of all parties that the lease had been taken to him after his father. The lease having been produced by B as his title to be enrolled as a voter in the county, the exact terms of it were ascertained by C. B obtained from C a letter, signed by him before witnesses, but neither holograph nor tested, declaring that he would never claim any right to the lease, being confident that B was the right and lawful tenant. Afterwards C raised against B an action concluding that it should be found that he, as the heir-male of A, had the only right and title to the lease, and that B should be removed and should account to him. It was held, *first*, That the right on A's death devolved on C as his heir-male, and was vested in him without service, and that the import and effect of the destination so expressed in the deed of lease are not altered by the circumstances of the duration of the right after the death of the original tenant having been placed on the life of the defender B, his second son, which must be presumed to have been selected for good reasons for the benefit of the heir-male, whosever he might be. *Second*, That none of the statements in the record were relevant to control the express and unambiguous words of the contract of lease, as there were no *termini habiles* for inquiring into intention in derogation of those words.¹

No power to object is vested in the heir-at-law excluded. If any conditions are inserted, non-implementation of them by the heir of destination may entitle the landlord to render the right void by a declarator of irritancy or by a removing. But in him alone the power of avoidance resides. A lease was destined to the heir-male of the tenant on condition that the subjects were left completely stocked. The tenant died intestate, so that the stocking went to his executors, who for some time possessed under the lease. The heir-male acquired the stocking before the expiration of the lease, paid the last half-year's rent, and concurred with the landlord in naming appraisers to estimate the amount of meliorations payable at the end of the lease. It was held that, although the landlord might have excluded the heir-male, yet that, having recognised him as tenant, it was *jus tertii* to a party liable for the meliorations to plead that the heir-male was not entitled to the lease under the destination.²

Art. 2.—
Destination
by Deed of
Lessee, or
his Trustees.

1. BY LESSEE HIMSELF.—For the purpose of avoiding the bad [216] effects of devolution to a minor, heirs-portioners, or a person

¹ Dunn v. Dunn, 28 Feb. 1835, 13 S. 590. [See Crichton v. Lady Keith, 11 March 1857, 19 D. 713. Macalister v.

Macalister, 22 Feb. 1859, 21 D. 560, 31 Jur. 297.]

² Fraser v. Fraser, 30 June 1831, 9 S. 849, 4 D. and A. 225.

incapable of managing, leases may be granted with power to the lessee to name an heir, or, in other words, to convey the lease to any member of his family.¹ Where that power exists, it can be exercised by a *mortis causa* deed, by which the lease will devolve conformably to the will of the deceased lessee, to the exclusion of the heir-at-law. But the power must be given in express terms; and where assignees are excluded it will not be held to be implied, either from considerations of utility or from the flexibility of the terms "heir or heirs."² In consequence, where there was a clause of seclusion, the lessee was held to be barred from conveying the lease to his son-in-law.³

Afterwards it was decided that a lease for thirty-eight years to heirs, but secluding assignees, could not be settled by the lessor upon his second son, but must devolve to the heir-at-law.⁴ Upon appeal, *first*, great doubt was expressed of the soundness of the judgment; *second*, the previous decision, it was stated, had not been followed as a precedent during the period intervening between the two decisions; and *third*, it was said that it appeared that an assignee and an heir nominated were very different characters; and that by assignee, in the actual case, was meant that person who was an assignee not being an heir nominated.⁵ The cause was therefore remitted, with a special order to consider how far the meaning of the term "heirs," as used in the different parts of the lease, affected the construction to be given to the terms "the lessee and his heirs," and "the heir or heirs of the lessee, who shall at the end of the thirty-eight years have succeeded to and be in possession of the farm."⁶ The judgment was adhered to upon reconsideration, and although strong doubts were expressed, the rule is held to be fixed.⁷

On the same day on which that cause was originally determined, it was decided, in consequence of special matter, that a second son to whom a lease had been conveyed was entitled to continue in possession, as he had continued to possess without

¹ Deuchar v. Lord Minto, 1798, Mor. 15,295. Bell's Pr. 1319.

² Deuchar v. Lord Minto, *ut sup.* Cunningham v. Grieve, *ut infra*. 1 Bell's Com. 82. 2 Ersk. vi. 31, Note *. Bell's Pr. *ut sup.* 2 Stair, ix. vol. i. p. 371, Note (by Brodie).

³ Deuchar v. Lord Minto, *ut sup.*

⁴ Cunningham v. Grieve, 1803 Mor. 15,298.

⁵ Per Lord Eldon, C. Lord Rosalyn thought the case well decided by the Court below. 1 Bell on Leases, 162-6, Note.

⁶ 1 Bell on Leases, 166, Note. Grieve v. Cunningham, 1804, 4 Pat. 571; 1805, Mor. App. Task. 9; aff. 1806, 6 Pat. 16.

⁷ Mor. and F.C. *ut sup.*; and 1 Bell, 167-8. Authorities *ut sup.* Grieve v. Cunningham, *ut sup.*, was subsequently compromised. After the compromise and arrangement there were a judgment of the Court of Session and an appeal (4 Paton's App. Cases, 571); but of these the subject-matter shall be examined hereafter under Assignment.

Cunningham v. Grieve.

Darroch v. Bennie.

Entails of
leases—
continued.

assignee can alter the contract with the lessor, which the assignee *ex lege* must always perform. Subject to this fundamental rule, all prohibitions, limitations, restrictions, and conditions imposed by the party conveying, and entitled to convey, took effect *inter hæredes* at common law.¹ Registration under the Statute 1685 is neither competent nor necessary, because the statute does not relate to subjects incapable of infeftment, and because a lease is a personal right, and the right itself is qualified, so that it is neither the better nor the worse for recording.²

E. of Dal-
housie v.
Maule, and
Maule v.
Maule.

Although leases of teinds and of rights to mines (the latter not being otherwise acquirable) have long been contained in the entails of many family estates,³ only one instance of the entail of leases as separate subjects has hitherto been brought under judicial cognisance; but in that instance the law was solemnly examined and [223] fixed. In 1724 leases were granted for ninety-nine years, with power to the lessees to assign. An entail of those leases was executed in the form of an assignation in favour of the same series of heirs as was called to the succession of certain feudal property. By subsequent deeds the destination of the whole property, feudal and leasehold, having been altered, there arose in 1782 a competition in which, among other questions, the competency of entailing leases was tried. On that question it was held that "leases, although none of the objects of the Statute 1685, may yet be settled by entail; of which, however, few instances have occurred."⁴ There having been made an agreement, for the purpose of executing which a submission was entered into, the arbiters altered the judgment of the Court in so far as regarded the leases.

An action of reduction of that decret-arbitral was instituted in 1809. In 1817 the Court of Session, holding that the question of the subsistence of the entails of the leases was still open, decided that the entails were prescribed, there being also an unlimited title, and the possession not having been specially applied to the entail.⁵ After various other proceedings, the question of the validity of the entailed leases was, by a new suit, again brought under discussion in 1821. The Court of Session having sustained a plea of *res judicata* in bar of the suit, the cause was, upon appeal, remitted (on 26th May 1826), so "far as concerns the right and title to the said leases." When the cause was again considered, doubts of the validity of those leases were expressed by a part of the Court.⁶

¹ Opinion of Lord Balgray in *Maule v. Maule*, *ut sup.*

² Lord Balgray, *ut sup.*

³ Opinion of Lord Braxfield in *E. Dalhousie v. Maule*, 1782, Mor. 10,963, as cited in the opinion of Lord Balgray in *Maule v. Maule*, *ut sup.*

⁴ *Earl of Dalhousie v. Maule*, *ut sup.*

⁵ *Maule v. Maule*, 2 Dec. 1817, F.C. 394.

⁶ *Maule v. Maule*, 4 March 1829, *ut*

But the great majority having either expressly held or assumed the validity, the judgment fixed the law to be as already stated.¹

An important and beneficial alteration has been made on the common law by a recent statute. By the 11 and 12 Vict. c. 36 (14th August 1848), s. 49, it is enacted, "that where any land or estate in Scotland shall by virtue of any tack, assignation of tack, or other deed or writing, dated on or after the first day of August 1848, be held in lease either directly or through trustees for his behoof by a party of full age, born after the date of such tack, assignation of tack, or other deed or writing, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such tack, assignation of tack, or other deed or writing, or by which the same or the interest of such party therein may be qualified, such prohibitions, conditions, restrictions, or limitations being of the nature of prohibitions, [224] conditions, restrictions or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir." There is a proviso "that it shall be lawful to the proprietor of whom such a lease is held to enforce any prohibitions, conditions, restrictions, or limitations, contained in such tack, assignation of tack, or other deed or writing, which shall have been inserted therein, for the *bona fide* purpose of protecting the just rights and interests of such proprietor, in so far as such enforcement may be necessary in order to such protection."²

This statute leaves the common law operative, *first*, as to leases executed before the time named, and *second*, as to persons born before the date of the lease, although that date be after the time named. Even as to persons born after the time named, the statute is permissive, so that it may be deemed if they do not alter the entail will subsist.

Whether the heir succeed *ab intestato* or by a settlement service is not necessary to enable him to take a lease.³ For leases vest by mere apparenay without service, to the effect not merely

Art. 4.—
Heir succeeds to a
Lease without
Service.

sup., per Lord President, F.C. 998, Lord Justice-Clerk, F.C. 748.

¹ *Maule v. Maule*, *ut sup.*

² Although this statute has been in force for eleven years, no case under it appears to have occurred, which may be deemed to have resulted from entails of leases not being of frequent occurrence.

³ 3 Stair, v. 4 and 6, and Notes (by

Brodie), vol. ii. 525-6 A, and 561 A; 3 Bankt. v. 9; 3 Ersk. viii. 77; 1 Bell's Com. 759; Sandf. on Herit. Suc. 291-2; Menzies' Lect. 825. *Scott v. Baird*, 1754, Mor. 14,376, 5 B. S. 814, per Lord Pres. Campbell in *Veitch v. Young*, 1808, Mor. App. Serv. and Conf. 4. *Maule v. Maule*, *ut sup. passim*. *Dunn v. Dunn*, 28 Feb. 1836, 13 S. 590.

of possessing but of transferring the right.¹ The doctrine was early fixed in those cases where the heir himself was to possess.² But a service was anciently,³ and even by modern authors, as Bankton⁴ and Ross,⁵ deemed necessary to qualify the heir to convey. Where the duration of the lease was for several lives (to which three nineteen years were deemed to be tantamount) Steuart held that service was not necessary to carry the lease;⁶ and the existing rule is that without a service an heir can convey a lease of that duration for which conveyance is competent;⁷ can challenge a conveyance made [225] by his predecessor; and can remove an assignee in possession by virtue of that conveyance.⁸

Art. 5 --
The *Jus delib-*
erandi ap-
plies to
Leases.

No decision has been discovered which determines expressly the inclusion of leases under the *jus deliberandi*. But there are good reasons for deeming that they are included. 1st, The principle of the common law upon which the right is founded is, that as no one can be obliged to take *hereditas damnosa*, he shall have time to ascertain the true character of the inheritance. This rule is as applicable to a lease as to any other kind of inheritance. 2d, The Statute 1695, c. 24, ordains that an apparent heir shall be allowed "year and day to deliberate, in which time he may make the foresaid inventory, which he is to give up upon oath, full and particular as to all lands, houses, annual-rents, or other heritable rights whatsoever, to which the said appearand heir may or pretends to succeed." In a subsequent clause there is a provision relative to the case where the defunct had no lands or heritage requiring seisin. And throughout mention is made in general terms of the "heritable estate" of the deceased. The terms, as well as the purview and intendment, applying to all the heritable property, and not merely to that which has been feudalised or is capable of being so, leases must be held to be included. 3d, In practice, leases are inserted in inventories as portions of the herit-

¹ Bell's Pr. 1680; More's Notes, cccix-xx.

² Rattray v. Graham, 1623, Mor. 14,374, 10,366. Rule v. Hume, 1635, Mor. 4374. Boyd v. Sinclair, 1671, Mor. 14,375. Hume v. Johnstone, 1675, Mor. 14,375.

³ Rattray v. Graham, *ut sup.* Spottiswoode Heirs, 135.

⁴ 3 Bankt. v. 9.

⁵ 2 Ross' Lect. 597.

⁶ Dirl. and Steu. 121.

⁷ Ersk. *ut sup.*; Bell's Pr. *ut sup.* More's Notes, *ut sup.*; 3 Stair, *ut sup.* Notes (by Brodie). Campbell v. Cunningham, 1739, Mor. 14,375. Scott v.

Baird, *ut sup.* Hay and Wood, Peta., 1801, Mor. 15,297; but for the matter in that case relative to the question under examination. Stair, v. 4, vol. ii. 525-6, Note h (by Brodie).

⁸ Scott v. Baird, *ut sup.* In the 20 and 21 Vict. c. 26, Registration of Long Leases Act (10th August 1857), mention is made of general and special services as applicable to leases. This anomaly shall be observed on under the chapter (*infra*) embodying the description of the statute. It is enough to say here that the statutory words do not subvert the rule of the common law.

able estate; and it was held that the heir of a lessee may enter *cum beneficio inventarii*.¹ And 4th, It would be detrimental to the interest of the lessor, as well as to that of the heir, if the latter had not time to deliberate. Nor is the right impaired by the necessity under which the heir must be of entering into possession, and of cultivating, because, *first*, the possession must be deemed experimental merely in order to enable him to ascertain the value of the inheritance; and *second*, the cultivation is for the benefit of the lessor, whose manager the heir is during the *annus deliberandi*.

As an heir may repudiate, so he may forfeit by doing acts inconsistent with his rights as heir. Where an heir had acknowledged the right of trustees to a lease as falling under a general conveyance to them, by possessing the farm for several years on a missive from them, it was held that he was not entitled to claim the lease in his character of heir.²

Heir barred from claiming lease.

SECTION III.—TERCE AND COURTESY.

[226] A terce is not due out of leases, because a lease is not a feudal right.³ Neither do leases fall under the courtesy, which is limited to those subjects in which the wife was infeft.⁴

CHAPTER VIII.

ASSIGNEE AND SUBLESSEE.

SECTION I.—DEFINITION OF ASSIGNATION AND SUBLEASE.

By an assignation of a lease the assignee becomes the sole lessee, being substituted in the place of the cedent or original lessee, who in consequence is freed from all the obligations of the contract.⁵

¹ *Laird v. Grindlay*, 1791, Ball's Cases, 296. *E. Galloway v. M'Hutchin*, 6 June 1803, 1 Ball's Com. 80-1.

² *Munro v. Munro*, 1825, 4 S. 328. [Comp. *Gray v. Low*, 21 Jan. 1869, 21 D. 293.]

³ 2 Ersk. ix. 49.

⁴ 2 Stair, vi. 19, and Note c (by Brodie). 2 Ersk. ix. 52-5.

⁵ 1 Ball's Com. 76. 1 Jurid. Styl. 4th edit. 539. 2 Stair, ix. vol. i. p. 371, Note (by Brodie). *Skene v. Greenhill*, 20 May 1825, F.C. p. 777, 4 S. 25.

But a sublease is a grant, not by the landlord, but solely by the lessee whose tenant the sublessee is, and who therefore in the ordinary case, notwithstanding the sublease, continues bound to implement all the obligations.¹

SECTION II.—DIFFERENCE OF THE ENGLISH AND SCOTCH LAW, AND GENERAL RULE OF THE LATTER.

England.

In England a lease is held to vest an absolute estate for years in the lessee, to which estate the power of assignment or subletting is incident although not expressed, and subsisting unless expressly restrained.² The principle of selection of a tenant by reason of superior skill or honesty is admitted, and therefore a covenant not to assign, or a *proviso* of re-entry in case the lessee do assign, is legal;³ but such restraints on alienation are construed with jealousy.⁴

Scotland.

In Scotland also a lease is regarded as an absolute estate for years,⁵ but by the adoption of a principle the reverse of [227] that of the law of England, the power of alienation is excluded unless by a grant, either express or arising out of qualities in the contract deemed by necessary legal implication to include that power.⁶ This rule is founded upon the doctrine that leases are *stricti juris*, and involve a *delectus personarum*, as has been already explained in treating of the right of the lessee's heir.⁷ Both of these elements were considered to be applicable *a fortiori* to the assignation or sublease. In the Books the general *dictum* (for there are exceptions) is that assignees or sublessees are excluded unless there be a clause of power either express or implied.⁸ As the application of

¹ 2 Stair, ix. 22. 2 Bankt. ix. 17. 2 Ersk. vi. 34, and Note (by Ivory) 113. 1 Bell's Com. 176. 1 Jurid. Styl. 4th edit. 636. Ronaldson, Pet., 18 Dec. 1812, F.C. p. 49.

² Woodfall's Law of Landl. and Ten. 392. Church v. Brown, 15 Ves. 258.

³ Woodfall, 391-2. Hunter v. Galliers, 2 T. R. 133, 138. Magan v. Slaughter, 1 Esp. 8. Falkington v. Cress, 3 Anstr. 700.

⁴ Woodfall, 392. Church v. Brown, *ut sup.*

⁵ 1 Bell's Com. 75.

⁶ 1 Bell's Com. 75-6.

⁷ *Supra*, c. vii. s. i. 218.

⁸ Balfour 208. (A reference is made by Balfour, *loco citato*, to R. M. fol. 764; and in the life of Balfour prefixed to the Practicks, p. 10, it is said of this reference that it is one of those which are

not to be found in any of the four Books of the Regiam Majestatem, but among the collection of statutes and law treatises commonly subjoined to them. It has not, however, been discovered.) 2 Craig, ix. 23 and x. 3, 6. 2 Stair, ix. 22, 26, and 3 Stair, i. 16. 2 Mackenzie's Inst. vi. 7, 8. 2 Bankt. ix. 11, 15. 2 Ersk. vi. 61, 33 and Note *. 2 Ross' Lect. 483-4. 1 Bell's Com. 76-7. Bell's Pr. 1215-16. More's Notes, cxlviii. 1 Bell on Leases, 175-6 and 187. 2 Stair, ix. Note vi. (by Brodie). Tait's Justice of Peace, 387-8. Rattray v. Graham, 1623, Mor. 10,386. Binnie v. Sinclair, 1672, Mor. 10,382. Hume v. Lyell, 1680, Mor. 10,391. Hunter v. Brown, 1681, 3 B. S. 387. Scrymgeour v. Mitchell, 1775, 5 B. S. 618. This case was originally decided on general doctrine, but ultimately on special mat-

the rule to agricultural leases of ordinary duration is fixed law, the doubt expressed by Erskine,¹ of the exclusion of sublessees except by an express clause, is unfounded.

SECTION III.—APPLICATION OF THE RULE.

In conformity to this rule, a lease expressly granted to the ^{Art. 1.—} ^{Lease ex-} ^{pressly to} ^{Assignees} ^{and Sub-} ^{lessees.} ^{essee, his heirs, assignees and sublessees, necessarily confers the} power of assigning or subletting.² This clause of power appears to have been introduced gradually and with circumspection. In the older style the power of assigning is not inserted, and the power of subletting is limited to "subtenants of no higher degree than (the tacksman) himself."³ Assignees in conjunction with sublessees were afterwards inserted, but with the same restriction of station.⁴ [228] The reason of these restrictions will probably be found in the anxiety of landholders to preserve their territorial influence, which, while it would be increased by parcelling out lands under lease to the assistants of the tenants, would have been impaired had the tenant substituted in his place a person of more importance than himself, who might have resisted the authority of the landlord, or even forcibly retained possession.⁵ When the notions of feudal domination expired, and property became more secure, this restriction was removed, and the clause of power was made applicable in unqualified terms to assignees and sublessees.⁶

An assignation of a lease was construed to be in favour of the heirs of an assignee, although not mentioned in the deed.⁷ And where the lease contains express power to assign or sublet, the whole stipulations are available to any assignee or sublessee who shall acquire right.⁸

Power to "output and input tenants" confers the power of sub- ^{Art. 2.—} ^{Power to} ^{output or in-} ^{put Tenants} ^{letting, but not of assigning,⁹ as the original meaning of a power to sublet was to enable tenants to people their possessions properly by parcelling out portions of them among their assistants,¹⁰ who in}

ter. *Alison v. Proudfoot*, 1788, Mor. 15,290. *E. Peterborough v. Milne*, 1791, Mor. 15,293. *E. Cassilis v. Macadam*, 1806, Mor. App. Tack. 14.

¹ 2 Ersk. vi. 33.

² Authorities, *ut sup.* note.

³ 2 Dallas, 509.

⁴ Spotts, Styl. 363; 2 Ross' Lect. 486.

⁵ Introduction, c. vii. p. 68. 2 Ross' Lect. 482 and 486.

⁶ 1 Jurid. Styl. 2d edit. 632.

⁷ *Telfer v. M'Dougal*, 1811; Hume 857.

⁸ *Bell's Pr.* 1217. *M'Guffog v. Agnew*, 1822, 1 S. 342.

⁹ 2 Stair, ix. 22. 2 Bankt. ix. 15. 2 Ersk. vi. 33. 1 Bell on Leases, 192.

¹⁰ 2 Ross' Lect. 486.

the older cases are styled "helps."¹ The power of giving possession to those persons and of removing them was necessary where subdivision was authorised, and that power was styled "a right to output and input tenants." But the power of substituting by assignation another tenant in the possession of a whole farm was not contemplated, and therefore those terms did not convey that power. But although (as will immediately appear) the power of subletting the whole of a farm was not anciently held to be competent, yet when it was recognised it was deemed to be conferred by those terms.

Art. 3.—
Power of
Subletting
not to be pre-
sumed.

The tenant of a farm having sublet the farmhouse, the landlord applied for a warrant of ejectment against the subtenant. The tenant pleaded that power to sublet had been stipulated. He also pleaded that such a power must be presumed, because, *first*, when the lease was granted the landlord was aware that he was the [229] tenant of another and larger farm, and therefore could not personally occupy the house in question; and *second*, because the landlord had acquiesced. The lease could not be found. It was held, and soundly, that power or permission to sublet was not to be presumed without proof, and that the tenant had failed to prove any such power or permission.²

Art. 4.—
Power of
Subletting
now gives
Power to
Sublet the
whole Sub-
ject.

For the reasons already stated, the power of subletting was considered to apply only to granting to inferior persons portions of the farm. It was not intended to give to a lessee the power of subletting the whole, or in other words, substituting another in his place.³ In defining the distinction between an assignation and a sublease it was laid down that the sole difference between a lease bearing to assignees and a lease bearing to sublessees was that a lease to assignees might be wholly assigned, and a lease to sublessees conferred a power to sublet a part only.⁴ But the existing rule is that where there is a power to sublet there can be granted a sublease of the whole subject.⁵

Art. 5.—
Power to
Sublet does
not give
Power to
Assign, and
vice versa.

Although there is now no limitation of the extent of a sublease, a power to sublet does not confer a power to assign, nor does a

¹ Souper v. Wauchope, 1694, 4 B. S. 156.

² E. Glasgow v. Hamilton, &c., 3 July 1851, 13 D. 1290, 23 Jur. 605.

³ 2 Ross' Lect. 486.

⁴ 2 Ross' Lect. 486; 1 Bell on Leases, 468. Binnie v. Sinclair, 1673, Mor. 10,382. Grant v. L. Bracco, 1743, Mor.

15,279. Bowack v. Croll, 1743, Mor. 15,280.

⁵ 1 Bell's Com. 77; 2 Ross' Lect. 487; 1 Bell on Leases, 469. Crawford v. Maxwell, 1768, Mor. 15,307. Trotter v. Dennis, 1770, Mor. 15,382. Ogilvie v. Cra. of Fullarton, 6 July 1791, n. r., noted in Mor. 15,309, after Crawford v. Maxwell, *ut sup.*

power to assign confer a power to sublet, because (as formerly explained) an assignation and a sublease are essentially different.¹ Bankton² and Ross³ appear to lay down the doctrine, that as a power to sublet is less than a power to assign, the former is implied under the latter, while they concede that the converse will not hold good. But 1st, As subletting may be so exercised as to subdivide the farm, while, by assigning the whole must be conveyed, [230] the former may be more injurious to good agriculture, and therefore never contemplated by the landlord. 2d, According to the brocard, *Mentio signata unius est exclusio alterius*, the lessor by making mention of "assigning" only, excluded "subletting;" and 3d, As on the part of the lessee an exclusion of assignees is not an exclusion of sublessees, and *vice versa*,⁴ so on the part of the lessor a power to assign is not to be held to confer a power to sublet. *A fortiori* a power to sublet does not give power to assign, because the landlord, by a limitation to subletting, bars the substitution of another lessee, and retains the principal lessee bound to perform the prestations.

SECTION IV.—APPLICATION OF THE RULE UNDER IMPLIED POWER.

In certain leases, by reason either of duration or of the nature of the subject let, the common rule is reversed, and the power either of assigning or subletting, if it be not expressly excluded, is held *ex lege* to be implied.

The rule is fixed that power is implied in agricultural leases of definite but extraordinary duration.⁵ But there has not hitherto been laid down any precise rule by which it can be determined what duration will confer that power.⁶ Nor will it be

Art. 1.—
Agricultural Leases
of extraordinary
Duration.

¹ 1 Bell's Com. 77; 1 Bell on Leases, 193, 469; More's Notes, ccl.; 2 Stair, ix. Note vi. (by Brodie). Binnie v. Sinclair, *ut sup.* Rothead v. Moodie, 1687, Mor. 10,392. Crawford v. Maxwell, Trotter v. Dennis, and Ogilvie v. Cra. of Fullarton, *ut sup.*

² 2 Bankt. ix. 17.

³ 2 Ross' Lect. 486.

⁴ 1 Bell's Com. 77, and other authorities, *ut sup.*

⁵ More's Notes, ccxlix; Bell's Pr. 1215. 1st, Although Bell does not expressly say so, he seems to indicate that the implied power is more especially applicable to improving leases. There are no grounds for such a distinction.

2d, In the recent case of Stevenson v. Love, &c., 2 June 1842, 4 D. 1322 (14 Jur. 437), it was said by Lord Jeffrey that "the doctrine was stated a little too broadly by the defender when he pleaded that a lease of more than ordinary endurance must be presumed to be assignable unless assignees be expressly secluded. I rather think that it is a question to be decided *secundum arbitrium bonum*." No authority is given for this opinion, and while the *dicta* of the learned Judge are entitled to high respect, the view indicated is inadmissible, because at variance with fixed law.

⁶ 1 Bell's Com. 77; 2 Stair, ix. Note vi. (by Brodie).

easy to establish an accurate criterion, as there has existed much discrepancy relative to the duration necessary to constitute a long lease. Among the Civilians a lease for ten, five, or even three years was accounted long.¹ A lease for ten years was so deemed in France.² In England the practical duration of leases varies from one year to a thousand years; but those "for long terms" are described "as for five hundred years," and are seldom so held if under a century.³

What are
"long"
leases?

The opinions of the lawyers of Scotland have [231] varied much. A lease even for ten years was in the seventeenth century said to be "*ad longum tempus*;"⁴ and one for nineteen years was, in the sixteenth⁵ and seventeenth centuries considered to be equivalent to a liferent, and consequently to be an alienation,⁶ while one for less than ten⁷ or nineteen⁸ years was accounted short.

In one case a lease for a lifetime and two or three nineteen years was decided to be assignable.⁹ But that decision does not prove that a shorter duration would not have implied the same power—1st, Because liferent leases and leases for nineteen years were deemed equipollent, and liferent leases were then recognised as assignable; and 2d, Because it was held at a subsequent period that where a lease for nineteen years excluded assignees, but not sublessees, a sublease was valid.¹⁰ In the eighteenth century a duration "for divers nineteen years" or "for more than one nineteen years," was considered requisite;¹¹ and the general doctrine was that the power of assigning was implied in a lease granted for a definite period exceeding that of human life,¹² and was excluded in all leases of shorter duration.¹³ Conformably to the older doctrine, power to sublet was held to be implied in a lease for nineteen years.¹⁴ But this decision is now held to be erroneous, and has been overruled by the subsequent cases.¹⁵

Leases for
nineteen
years.

There are two points relative to the duration implying power to assign or sublet which are now fixed. First, a lease for nineteen¹⁶

¹ Carocius de Locatione et Conductione, 309-11.

² Pothier, vol. ii. p. 102.

³ Woodfall's Landl. and Ten. 168.

⁴ 3 Craig, iv. 5.

⁵ Baifour 203.

⁶ 2 Craig, x. 6. Dir. and Steu. 120 and 136.

⁷ 3 Craig, x. 6.

⁸ Dir. and Steu. 136.

⁹ Ross v. Blair, 1627, Mor. 10,368.

¹⁰ Ross' Lect. 484.

¹¹ Rothead v. Moodie, *ut sup.*

¹² 2 Bankt. ix. 11 and 46.

¹³ 2 Ersk. vi. 32.

¹⁴ 2 Ross' Lect. 484-5.

¹⁵ Duff v. Day, 1769, Hailes 289.

¹⁶ More's Notes, ccxlviii.

¹⁷ 1 Bell's Com. 76-7, Note. 1 Bell on Leases, 166, 191, and 443. 2 Ersk. vi. 33, Note *. 2 Stair, ix. Note vi. (by Brodie). Tait's Justice of Peace, 385. Crawford v. Maxwell, *ut sup.* Alison v. Proudfoot, 1788, Mor. 15,290. E. Peterborough v. Milne, 1791, Mor. 15,293.

or twenty-one¹ years is one of ordinary duration and consequently excludes that power; and *second*, a lease for fifty-seven or thirty-eight years is one of extraordinary duration, and consequently includes that power.² Whether a lease for any period intermediate between twenty-one and thirty-eight years would include the power is a question entirely open.³ According to past agricultural practice, the absence of any determination of it will probably produce no [232] serious inconvenience; for hitherto, with the exception of improving leases for thirty-one years under the 10 Geo. III., leases for nineteen years, or a series of nineteen years, have been principally in use. But as that period appears to have been adopted, not upon any principle of utility, but probably upon the assumption that it was equal to a lifetime,⁴ other periods may hereafter be deemed preferable, and then the determination of the question under consideration will become of practical importance.

1. *LIFERENT LEASES*.—Liferent leases imply, and from an early period have been held to imply, a power to assign or sublet, because they are deemed to confer a right more permanent, and more nearly approaching to property, than do leases of ordinary duration.⁵

2. *LEASE DURING OFFICE*.—Power to sublet is implied in a lease to a minister for the period of his incumbency as minister of a certain parish.⁶

SECTION V.—URBAN TENEMENT.

Throughout the decisions there are no *data* for determining whether a tenement is to be considered "urban" by reason exclusively of local situation, or whether the description of the tenement is likewise to operate. It has been said that the term urban applies to subjects although situated in the country, if they be of the same description as those situated in towns.⁷ There may be reason for deeming that, conformably to abstract rule, description, and not

¹ *Id.*, and *E. Cassilis v. Macadam*, Mor. App. Tack, 14.

² 1 Bell's Com. 77. 1 Bell on Leases, 186, 191. 2 Ersk. vi. 32, 33. Stair and Tait, *ut sup.* Trotter v. Dennis, *ut sup.* Simpson v. Gray, 1794, Mor. 15,294. Pringle v. MacLagan, 1803, Hume, 808.

³ [See observations *per curiam* in D. of Portland v. Baird & Co., 9 Nov. 1865, 4 Macph. 10.]

⁴ 2 Ross' Lect. 489.

⁵ 2 Stair, ix. 26, and Note vi. (by Brodie). 2 Mackenzie's Inst. vi. 7. 2 Bankt. ix. 11 and 46. 2 Ersk. vi. 32. 2 Ross' Lect. 484. 1 Bell's Com. 77. 1 Bell on Leases, 186 and 192. Tait's Justice of Peace, 388. Sandf. on Ent. 184. Hume v. Craw, 1637, Mor. 10,371. Duff v. Fowler, 1872, Mor. 10,282.

⁶ Pringle v. McLaggan, 1803, Hume 808.

⁷ 2 Stair, ix. Note 6 (by Brodie).

local position merely, ought to form the criterion. But there has not been observed any *dictum* in the Books or any decision shewing that such is the existing law; and, practically, urban tenements have been considered to be those situated in towns.

Art. 2.—
Power to
Assign or
Sublet held
to be implied
unless ex-
pressly ex-
cluded.

The connection which subsists between the lessor and lessee of [233] a house or urban tenement being considered more slender than that between the landlord and tenant of a farm, combined with the many accidents which under such a lease may render it necessary for the lessee to leave the house, and desirable for both parties that he should have the power of assigning or subletting, the principle applicable to those leases is the reverse of that applicable to agricultural leases; and a power to assign or sublet is held to be implied unless it be expressly excluded.¹

Although now fixed, this doctrine was admitted gradually and with reluctance. In the ancient Books no such distinction is to be found. While Bankton² approves of the doctrine, he speaks with hesitation of the fact that it had been fully recognised. In the earliest case in which the question was tried, although the decision settled the law in favour of the lessee's power, "the Lords were not unanimous, as several were of opinion that there is often no less an *electio personæ* in the tack of a house than in the tack of land."³

Question as
to leases of
manufac-
turing pre-
mises and
machinery.

This opinion, greatly modified, is still supported by an authority of weight; for it has been said that, in certain cases of urban tenements a *delectus personæ* is as natural and necessary as in an agricultural lease, as in the case of a shop, tavern, &c., having a particular character.⁴ In leases of manufactories furnished with machinery, it may be of essential importance towards maintaining its value that the machinery be steadily kept in operation; the skill and capital of the occupant are therefore of great importance to the proprietor. And it has been said, on the authority of a case cited, that when the use of the subject is combined with the arrangements of a manufactory, the *delectus personæ* prevails to bar a sublease or an assignment.⁵ Whether the opinion is to be deemed sound or otherwise, it does not appear to be warranted by the case relied on, in which no doctrine was laid down relative to the application of *delectus personæ* to a manufacturing subject;

¹ 2 Bankt. ix. 12. 1 Bell's Com. 76, and 2 Bell's Com. 32. Bell's Pr. 1274. 1 Bell on Leases, 184, note. 2 Ersk. vi. 31, 32, 33, and notes. 2 Stair, ix. Note vi. (by Brodie). Tait's Justice of Peace, 358. Aitchison v. Benny, 1748, Mor. 10,405; Elph. Tack, 13; Notes, 444.

Anderson v. Alexander, 10 July 1811, F.C. 327.

² 2 Bankt. *ut sup.*

³ Aitchison v. Benny, *ut sup.*

⁴ 1 Bell's Com. 76, Note.

⁵ Bell's Pr. 1274. E. Elgin's Tra. v. Walls, 14 May 1833; F.C. 347, 11 S. 585.

for the only general doctrine to be elicited from that case is, that where premises form the accessaries of an exclusive privilege, they, as well as the privilege, are intransmissible without the consent of the lessor.

The adoption of a rule that *delectus personæ* was to prevail or not according to the character or nature of the subject, would be of difficult practical application. The better course would be to lay [234] down the general rule either for the adoption or rejection of *delectus* (the latter being preferable), leaving the parties when they thought it advisable to invert or modify the rule by special stipulation. In applying the rule to manufactories, the power of assigning or subletting may be held to be implied or excluded according to the nature of the machinery with which the manufactory is furnished. In the more important districts the manufacturers are, with few exceptions, the owners of the premises; and consequently leases of such subjects are comparatively rare. But where the premises are let for a term of years, the larger machinery (consisting ordinarily of the engine and great gearing) forms the only apparatus with which they are furnished.

Character of subject let with reference to power of assigning or sub-letting.

In these cases the general rule ought to be, that the power of assigning or subletting is implied unless it be expressly excluded. The occupation and use of machinery of that description cannot be held to imply *delectus personæ*, because only common skill and attention are involved, and the operation of *delectus* would be directly at variance with the freedom of transmission which is acknowledged to be inseparable from extensive manufacturing concerns.

But if the manufactory should be let not merely with the large machinery, but with the small apparatus which constitutes the internal furnishing, a contrary rule might be applicable. As in the occupation and use of the smaller machinery more constant and minute care and attention are necessary, *delectus personæ* might justly be held to exist; and, practically, the rule would not be injurious to the freedom of commercial transmission. Except in combination with a lease of steam-power (which is a contract *sui generis*), leases of manufactories furnished with the small machinery are unknown in practice. In a few cases, immediately after bankruptcy for example, such a manufactory is occasionally let from month to month. But such cases are so rare that they cannot be taken into consideration in forming a general rule.

Under the existing law there are important limitations on the power of assigning or subletting. In so far as they have been

Art. 2.—
Limitations

on the power
of assigning
or sub-
letting.

Inversion of
use of sub-
jects.

hitherto settled, they appear to be included in the following enumeration :

1st, The subject shall not be assigned or sublet for a different purpose or different sort of habitation.¹ What shall amount to the [235] change of use sufficient to prohibit must always depend upon special matter. It has been said that the purpose to be recognised must be something similar to that for which the lessee took the subject; that a mere variation in the nature of the goods sold would not form a bar;² and that the power may be exercised, provided the lessee do not totally change the use of the subject.³ But it appears also to have been deemed that, where a shop was let for a special purpose, viz., to a dealer in one kind of articles, it could not be sublet for a different purpose, viz., to a dealer in another kind of articles.⁴

Amidst this discrepancy, the rule most accordant with principle and with practical utility seems to be to construe the exercise favourably for the lessee, and to bar only where the change is of a marked and detrimental character. In conformity, it was decided that where an assignee sublet, for the purpose of being used as a show-room for exhibiting wax figures, a shop in a good situation and formerly occupied by a silk mercer, there was created an inversion which the landlord was entitled at common law to prevent.⁵ Where a shop let "to a surgeon and apothecary" was sublet by him to "a grocer or huckster," it was pleaded that there was an inversion.⁶ There was a difference of opinion, part of the Court appearing to hold that there was an inversion,⁷ and part not.⁸ Although the exercise of the power was held to be barred, the decision is not a precedent for judging of the nature of inversion, because there was other matter which entered much into the *rationes* of the judgment. That matter was, *first*, that where the lessee knows that the sublessee is personally objectionable to the landlord, the sublease will be invalid;⁹ and *second* (it was said), that there was no

¹ 1 Bell's Com. 76, and 2 Bell's Com. 32. Bell's Fr. 1274. More's Notes, ccxlviii. 2 Ersk. vi. 33, Note (by Ivory) 112. Bell on Leases, Tait's Justice of Peace, and Anderson v. Alexander, *ut sup.* [See below, vol. ii. chap. xxxiv.]

² *Per* Lord Pitmilley in Gordon v. Crawford, 1825, 4 S. 95.

³ Lord Alloway in Gordon v. Crawford, *ut sup.*

⁴ *Per* Lord Justice-Clerk Boyle and Lord Robertson in Gordon v. Crawford, *ut sup.* Although the author may be mistaken in this construction of the

opinions of their Lordships, it appears to be warranted by the terms used, combined with the actual circumstances of the case, which shall be immediately stated.

⁵ Leecham, &c., v. Sievwright, 1826, 4 S. 683.

⁶ Gordon v. Crawford, *ut sup.*

⁷ Lords Justice-Clerk and Robertson.

⁸ Lords Pitmilley and Alloway. [See Hatton v. Clay, &c., 21 Dec. 1865, 4 Macph. 263.]

⁹ [1 Bell's Com. 76, Note. Gordon v. Crawford, *ut sup.*

authority for holding that where an urban tenement was let for a single year only the power of subletting was implied.¹

2*d*, The subject cannot be assigned or sublet for the purpose of being shut up or otherwise rendered unavailable.² There is no decision in which this doctrine has been expressly ruled; but there is one from which it may be directly and soundly elicited. Damages were found due by the tenant of an inn for shutting up the house.³ A case is easily supposable in which a proprietor or tenant [236] might desire to obtain a sublease of a rival concern for the purpose of shutting it up; and such a sublease would be an inversion.

Sublease to shut up, &c.

3*d*, As already indicated, where an exclusive privilege is attached to premises, they, as well as the privilege, cannot form the subject-matter of an assignation or sub-lease. A proprietor of lime and coal works, and of a neighbouring village, let the houses in the village to persons employed in the works, under a prohibition against carrying on any retail trade. He let the inn and bakehouse of the village for a term of years, with the exclusive privilege to the lessee of supplying the inhabitants with liquors and bread. The rent for the inn and bakehouse was separate from that for the exclusive privilege, and the rent for the latter was much higher than that for the former. In the missives of agreement (on which possession followed) there were, on the part of the lessee, obligations relative to the mode and terms of implementing the contract as to supplying liquors and bread, and, on the part of the lessor, there were obligations as to maintaining to the lessee the stipulated monopoly.

Exclusive privilege.

Earl of Elgin's Trs. v. Walls.

The lessee having died, his widow, acting for his eldest son who was a pupil, sublet the premises with the privilege attached under the conditions in the original missives, but without an obligation to pay the rent to the landlord. The sublessee never entered into possession, but again sublet at an advanced rent with a grassum. The second sublessee entered into possession, and paid the rent to the landlord, in whose books and receipts it was entered as paid by the heirs of the original lessee. A summary application for removal was presented by the lessor. The Court decided that the sublessee must remove, on the ground that he had no title, because the exclusive privilege was the principal subject of the contract, and the governing stipulations involved personal considerations; therefore

¹ Per Lords Justice-Clerk and Robertson in *Gordon v. Crawford*, *ut sup.* As the report bears that Lord Glenie thought that the interlocutor (annulling

the sublease) was right, his opinion ought perhaps to be added.

² Bell's Pr. *ut sup.*

³ *Graham, &c., v. Stevenson*, 1792, Hume 781.

delectus personæ was implied, and the qualities so created attached to the premises as accessories to the exclusive privilege, whereby the contract was intransmissible by the lessee without the lessor's consent, which had not been given.¹

Assump-
tion.

4th, Independently of these recognised restrictions and limitations, an opinion has been indicated that where assignees are excluded in a lease let for manufacturing purposes, this precludes the assumption of partners and a conveyance of the lease to them.² The question was raised, but not decided, in a case which occurred early in the eighteenth century.³ Whatever doubt might then exist, such an application of the rule of exclusion would now be productive of so much embarrassment in commercial dealings that its adoption could not be contemplated, even although in accordance with strict law. [237] But that it is so in accordance may well be doubted.⁴ The assumption of copartners, and the conveyance either by an assignation or a sublease of an interest in the lease of copartnery, does not impair the *delectus personæ*, for the personal qualities of the original lessee remain; nor does it effect an inversion.

Art. 4.—
Where an
Urban Tenement is let
for a single
year, is the
power of
Assigning
or Sub-
letting im-
plied.

The question must be deemed to be open, whether, when an urban tenement is let for a single year, the power of assigning or subletting is implied. The rule, it has been said, is that the tenant, even for a single year, has power to assign or sublet when not expressly prohibited.⁵ In the cases relied on in support of this *dictum* the leases were for a term of years. But the doctrine that there is a power to assign or sublet is laid down generally, and without reference to any specific duration, so that there is no exclusion of the power where the lease is for a single year.⁶ In a recent case it was said (as already indicated) that there is no authority for holding that under a lease for a single year the power is implied.⁷ While the *dictum* is of weight, and entered into the *rationes* of the judgment in the case in which it was announced, it does not convert that case, as has been said,⁸ into an authority that under a lease for a single year there is not a power to sublet; for the *gist* of the case was not what is the duration which implies power to sublet. There may be no express authority for the implied power, but the opinion in favour of it appears to be a legitimate inference from the

¹ E. Elgin's Tra. v. Walls, 14 May 1833, F. C. 347, 11 S. 585.

² More's Notes, cxlix.

³ Dick v. Skaila, 1706, 2 Fount. 330, 4 B. S. 643.

⁴ [See Borrowes & Co. v. Colquhoun, 25 May 1858, 24 Jur. 433; 1 Stuart

733; 11 Ang. 1854, 17 D., H. L. 81; 1 Macq. 691; 26 Jur. 641.]

⁵ Bell's Pr., 1274

⁶ Aitchison v. Benny, and Anderson v. Alexander, *ut sup.*

⁷ Crawford v. Gordon, *as in note, sup.*

⁸ More's Notes, ccxlviii.

precedents,¹ on a sound construction of which (the duration being no element) the power may be held to be implied under a lease for one year as well as under one for a term of years.

The question whether a house which has been let furnished can be assigned or sublet in whole or in part, not having been made the subject of judicial determination, must be deemed to be open. But the power of either assigning or subletting appears to be at variance with principle. The contract by which the right of possession and use of a house, with furniture, is granted to the lessee is complex, involving two subordinate contracts having different modifications of legal character, and each separable from the other, but in the [238] actual transaction so combined as to create an *unum quid*. *First*, There is the contract of lease applicable to the house, and *second*, that of pure location applicable to the furniture. A portion of the sum stipulated to be paid, and denominated "rent," must be deemed to be applicable to each of the portions of the contract; and the same complicated effect must pervade every part of the contract, which is styled the lease of a furnished house. But the rule that in the lease of an urban subject there is an implied power to assign or sublet, cannot be extended to a contract which necessarily involves the occupation and use of moveable property, which cannot be severed from the possession of the house. There is no rule or maxim according to which the use of the furniture can be made over to a person different from him to whom it was originally granted by the owner. The maxim of *delectus personæ* is strictly applicable, and public utility does not require that it should be subverted or relaxed.

Art. 5.—
Can a House
let furnished
be assigned
or sublet?

If a furnished house, or, in other words, a house and furniture, cannot be assigned or sublet, the nature of the contract debars an assignation or sublease of the house itself without the furniture. For the essence of the contract is that the house and furniture shall be jointly occupied and used by the lessee exclusively.

SECTION VI.—WHAT RULE APPLIES TO LEASES OF MINES AND FISHINGS?

Whether in leases of mines or fishings the exclusion of assignees and sublessees is implied if not inserted, or *vice versa*, is an open question. In so far as the rule of *delectus personæ* depends upon the intimate local connection between landlord and tenant, it will not apply. As in such leases the selection of a lessee possessed of capital, character, and skill is of the greatest importance, the maxim might be deemed applicable. But as leases of that kind

¹ Aitchison and Anderson, *ut sup.*

Lease of
Shootings.

are generally granted to companies, upon the dissolution of which they should be capable of being brought to sale, utility requires that exclusion should not be implied.¹ [An opinion has been expressed that a tenant of shootings, in the absence of stipulations on the subject, has no power to sublet, such a lease implying in a more emphatic sense than any other a *delectus personæ*.]²

SECTION VII.—CASES IN WHICH EXPRESS EXCLUSION IS INOPERATIVE.

Art. 1.—
Heir-at-
Law.

Notwithstanding an express exclusion of assignees and sublessees, an assignation or sublease to the heir-at-law of the lessee, even without the consent of the landlord, will be valid.³ A doubt has been suggested, on the authority of a judicial *dictum*, whether there [239] should not be a strict interpretation of the clause excluding assignees in tacks, the meaning of which was said to be that the master should have no other tenant except the person he had chosen for his skill and industry during his life.⁴ But the analogy which formed the foundation of the judgment in favour of an assignation or a sublease to the heir-at-law is conclusive, as it applies *a fortiori*. As the succession could have been propelled under a ward fee, and can be propelled under an entail, so it can be under a lease. By the right of the heir to succeed *delectus* vanishes, and a lease acquires all the qualities of heritage, and therefore admits of the propulsiion which is valid even under those rights to feudal property which are dealt with most strictly.

Art. 2.—
Donatary
of the
Crown.

For reasons formerly given,⁵ the King, succeeding *ob defectum hæredis*, appears to be entitled to convey to a donatary, notwithstanding a clause excluding assignees and sublessees. In one case, indeed, it was ruled that where a lease containing such a clause had been granted to a bastard, the lease did not pass to the donatary of the Crown.⁶ The judgment having been founded upon the general principle that in no case could the King, coming *in lieu* of the lessee *ob defectum hæredis*, transfer the right to the donatary, was clearly erroneous. Error would likewise have existed, although the decision had been rested upon the clause of exclusion. As such clauses do not bar the heir's right of succession, neither can they bar that of the King. But as a transfer to a donatary is indispen-

¹ [This question seems to depend on the duration of the lease in mineral leases. See opinions in *D. of Portland v. Baird & Co.*, 9 Nov. 1866, 4 Macph. 10.]

² [Per Lord Kinloch in *E. Fife v. Wilson*, 24 Dec. 1864, 3 Macph. 323.]

³ 2 Ersk. vi. 31, Note *; 2 Stair, ix.

Note vi. (by Brodie); Bell's Pr. 1219. Sutt'y, 1758, 5 B. S. 886. Hepburn v. Burn, 1759, Mor. 10,409. Crawford v. Whiteford, 1778, 5 B. S. 680.

⁴ More's Notes, ccxlix.

⁵ Sup. c. vi. s. iii. p. 187.

⁶ Falconer v. Hay, 1789, Mor. 1355; More's Notes, ccxlix.

sable towards enabling the Crown to hold the right, as distinguished from a right to a lease held by the statutory commissioners, its acquisition of leases containing such clauses would be virtually defeated if the transference were incompetent.

Where the lease devolved by escheat, the prohibition was held to be ineffectual. A lease containing a clause that it should not be assigned to any one of higher degree than the lessee, having fallen under the lessee's escheat, it was decided that the Lord of Regality (Archbishop of St Andrews), to whom the escheat had fallen, might assign the lease to any person of whatsoever degree. The rule of law successfully pleaded was, *Quod Episcopus in hoc casu utebatur jure fiscali ut licitum esset fiscali domino res suas disponere quando et cui voluerit sine ulla personarum exceptione.*¹ And in [240] an action pursued by a donatary to the escheat of one who had a lease of certain lands, which lease contained a similar clause, it was found that the lease ought to pertain to the donatary, although he was of higher degree.²

Leases, even liferent, when assigned, fall under the single escheat of the assignee, and therefore devolve to the Crown.³ Steuart questions this doctrine as applied to very long leases.⁴

SECTION VIII.—SPECIAL MODES OF OPERATION OF EXPRESS EXCLUSION.

While the rule that leases are to be strictly interpreted pre- Art. 1.—
serves to the lessor whatever right he has not expressly granted, *Exclusion of*
so it imparts to the lessee whatever right has not been expressly *Assignees*
withheld. In consequence, a clause excluding assignees will not *does not ex-*
exclude sublessees, nor will a clause excluding sublessees exclude *clude Sub-*
assignees. This doctrine, received at a period comparatively early,⁵ *lessees and*
has been sanctioned by a series of decisions.⁶ But it has been said *vice versa.*
that "if there be a clause of exclusion of assignees, it is held
also to exclude subtenants."⁷ This must have been said *per in-*
curiam; for it is adverse both to the decision relied on in support

¹ Borthwick v. Archbishop of St. Andrews, 1578, Mor. 10,383.

² L. Elphinstone, 1616, Mor. 15,273.

³ Hope's Min. Pract. t. vii. sec. 2, and note. Dirl. 120. 3 Stair, i. 16, and iii. 16. 2 Mackenzie's Inst. iii. 26. Mackenzie's Obs. 352. 2 Bankt. iv. 43. 2 Ersk. v. 61, 70 and 71. Ker v. Ker, 1635, Mor. 5071. Stewart v. Lady Samelston, 1631, Mor. 3623.

⁴ Steu. Answ. to Dirl. 121.

⁵ Rothead v. Moodie, 1687, Mor. 10,392. Madder v. L. Tarras, mentioned in the preceding case.

⁶ 1 Bell's Com. 77. 2 Stair, ix. Note vi. (by Brodie). Crawford v. Maxwell, 1758, Mor. 15,307. Trotter v. Dennis, 1770, Mor. 15,282. Ogilvie v. Cra. of Fullerton, 1791; n. r., noted in Mor. 15,309.

⁷ Bell's Pr. 1216.

of it, and to the deliberate opinion of the same eminent jurist in an earlier treatise.¹

An opinion has also been indicated that it is difficult to reconcile the doctrine, that the exclusion of assignees does not bar the right of subletting, with the rule that in ordinary leases subtenants are excluded where the power of subletting has not been expressly given; and that it is not easy to understand the principle on which the express exclusion of assignees should be held equivalent to an implied power of subletting.² Whatever effect might be given to so subtle a principle, had it ever been maintained, there is error in deeming that it ever was ruled or even maintained, and [241] that it was the *ratio* of the decisions which embody the recognised doctrine. The principle is, that sublessees are not excluded although assignees be, if there be either express mention of subtenants, as in one of the governing cases,³ or implied power from the duration of the lease, as in the other.⁴

Art. 2.—
Power to
exclude per-
sonal to
landlord.

Whether the exclusion be express or implied, the right of exercising it is personal to the landlord.⁵ A clause excluding assignees (it was held) is pleadable only by the landlord.⁶ Where an agricultural lease to heirs, but excluding assignees, was, by the lessee, conveyed to his son-in-law, the Court were of opinion that it was *jus tertii* for the heir-at-law to plead the alleged nullity of the ancestor's deed, if the landlord had acquiesced in it.⁷ And the general rule was afterwards held to be quite established.⁸ The converse therefore is also fixed law; for if the landlord acquiesces the conveyance will be valid.⁹

Art. 3.—
Construction
of Exclusion
unless
Lessor con-
sents.

If the lessor does not wish absolutely to exclude assignees and sublessees, but to admit or exclude them as he shall deem proper, there is inserted a clause of exclusion, "unless specially approved of by a writing under the hand of" the landlord.¹⁰ The sound construction of that clause is, that the landlord is not bound to give any reason for withholding his consent.¹¹ Of that clause the older construction was, that the landlord was under judicial control in

¹ 1 Bell's Com. *ut sup.*

² More's Notes, ccxlviii.

³ Crawford v. Maxwell, *ut sup.*

⁴ Trotter v. Dennis, *ut sup.*

⁵ 1 Bell's Com. 77-8, and Note; Bell's Pr. 1218; More's Notes, ccxlix; 2 Ersk. vi. 31, Notes; 2 Stair, ix. 43, vol. i. p. 372, Note a (by Brodie).

⁶ Trotter v. Hall, 1780, Hume 878.

⁷ Deuchar v. Lord Minto, 1798, Mor. 15,295.

⁸ Hay and Wood, Peta., 1801, Mor. 15,297. M'Coag v. M'Sporan, 1803, Hume 813.

⁹ Darroch v. Rennie, 1803, Mor. 15,301. Grieve v. Cunningham, 1804, Mor. App. Tack, 9.

¹⁰ 1 Jurid. Styl. 4th ed. 466.

¹¹ [D. of Portland v. Baird & Co., 9 Nov. 1865, 4 Macph. 10.]

the exercise of his discretionary power, was bound to assign his reasons for rejection, and that, if they were bad, he might be compelled to admit.¹ Although that doctrine was long held in practice to be the settled construction of the contract,² subsequent examination proved that, if not at variance with authority, it was not sanctioned by it. In the earliest case which has been traced as involving the question, it was [242] not decided. A tack being sent to a man, his heirs and subtenants, whom the setter shall be content with and accept of, alienarily secluding his assignees, and the tackman having granted a subset without the heritor's concurrence, the question occurred, what was the import of the above clause, whether it entitled him arbitrarily to withhold his consent, or, if he was obliged to give reasons for his dissent, to be judged of *secundum arbitrium boni viri*. This was debated but not ultimately determined.³ In the next case which has been relied upon as involving the doctrine the matter was not tried. The lease was granted to "the tenant, his heirs, and such assignees as the lessor should approve of, excluding all other his assignees." A creditor of the lessee comprehended the lease under a process of adjudication. The lessor pleaded that the lease was not transmissible to assignees without his consent, which he refused to give. In the argument the effect of the clause, as including the power of rejecting arbitrarily, or only upon reason given, was incidentally stated, but the nature of the clause of consent was not examined. The gist was, that the lessor could not be compelled to receive the adjudging creditor as his tenant, because assignees were expressly excluded; and the judgment was, "that this tack, as it expressly excludes assignees, is not adjudgable."⁴

In a subsequent case the clause was to "the tenant, his heirs and assignees whatsoever, of no higher degree than himself, and with whom the lessor shall be content and accept of alienarily." Clause requiring Lessor's consent. The lease was assigned, without the lessor's consent, in security of a debt. In an action at the instance of the assignee, which incidentally emerged, the lessor appeared and pleaded that the assignation was invalid by reason of the absence of his consent. Three questions were argued, *first*, Whether the lessor could arbitrarily withhold his consent? *second*, Whether, according as the lease could or could not be adjudged where there is an express exclusion of assignees, it could be assigned voluntarily? and *third*,

¹ 1 Bell's Com. 78; 2 Ersk. vi. 31, Note (by Ivory) 107; 2 Stair ix. Note vi. (by Brodie).

² 1 Bell's Com. 78, and Notes to Ersk. and Stair, *ut sup.*

³ Lady Monkton v. Balderston, 1772, Mor. 673.

⁴ Elliot v. D. of Buccleuch, 1747. Mor. 10,329.

Whether the rule by which adjudication was barred was also applicable to an assignation in security of debt? The decision was that the assignation was invalid.¹

While the existence of the second and third questions precludes the case from being held as representing the pure point, the judgment may be held to have really depended upon the determination of the first question. For whatever consideration the assignation was made, it would have been valid if the landlord was obliged to give, but did not give, a good reason for withholding his consent. [243] But as, although he gave no reason, the assignation was held to be bad, the *ratio* must have been that he was not bound to give a reason. In consequence that case must be held as affording, if not a direct precedent, at least a strong indication of a rule at variance with that afterwards supposed to have been long operative.

Clause requiring consent of the landlord, — continued.

Although in a subsequent case a similar clause existed, yet the nature of the consent requisite was not involved. The question was, Whether, notwithstanding the exclusion of assignees and sub-lessees, the lessee could assign to his heir *aliiquei successurus*? and, as formerly noted, it was decided that he could.² The construction appears to have originated from an erroneous note of a judgment, without details, inserted in a book of authority.³ Confirmation of the doctrine was deemed to have been derived from the judgment in a subsequent case. A lease had been granted for nineteen years to the lessee, his heirs and assignees, "such assignees being always agreeable to, and approved of," by the lessee in writing. After possession for some years the lessee was sequestrated under the then existing Bankrupt Act (12 Geo. III. c. 47), and by virtue of that statute he executed a trust-deed empowering his trustees to dispose of the lease. The lessor presided at a meeting of the lessee's creditors, at which it was resolved to sell the lease. Previously to the sale he consented to it in writing, but upon conditions so objectionable that nobody would bid. The lessor himself bought the lease, and afterwards granted it to another lessee for a much higher rent. Actions of reduction and removing having been raised by the former lessee, they were sustained by the Court of Session and the House of Lords.⁴

But by neither of these cases was the supposed doctrine estab-

¹ Sanderson v. M. of Tweeddale, 1756, Mor. 10,407.

² Hepburn v. Burn, 1769, Mor. 10,409.

³ D. of Roxburgh v. Archibalds, 1785, Mor. 10,412, Bell's Com., Notes to Ersk. and Stair, *ut sup.*

⁴ Valentine (sometimes called Ballantine) v. Ramsay, 29 June 1791, in Court of Session, and 4 March 1793, 3 Pat. 287, 1 Bell's Com. 78, Note, 1 Bell on Leases, 179-80.

lished. There was no warrant for inserting the report of the former case, because the matter decided in it related to the power of an outgoing lessee to dispose of his straw, and not to the power of the lessor to admit or refuse an assignee or sublessee;¹ while in the latter the grounds of the decision were, *first*, that the lessor had given his consent, which he afterwards wished, but was not permitted, to retract,² and *second*, that his conduct approached nearly to fraud.³ In a subsequent case (relied upon as in point) no argument was founded upon the clause of consent, and the question [244] at present under consideration was not raised.⁴ The soundness of the doctrine having afterwards been questioned, the general point of law was argued, but not decided, the lessee having renounced the sublease, and the Court having inserted in their judgment a special qualification that it was not meant to decide any question between the lessor and principal lessee.⁵

But after solemn consideration the judgment was overruled, and the general rule established, that a landlord who has granted a lease secluding assignees and sublessees is not bound to state any reason for withholding his consent to a sublease.⁶

Lessor not bound to state any reason for refusing consent.

By necessary consequence the rule is applicable to an assignment. A farm was let to a tenant, his heirs and assignees, his assignees being always such as the landlord should be pleased with and should approve of in writing. The lease was renewable for nineteen years on the demand of the tenant at the expiration of every duration of nineteen years, and so for ever. During the currency of a renewed lease the tenant requested the landlord to give him a general written consent to assign or sell the lease, in order to enable him to pay his father's debts. The landlord gave him such an assent; but the tenant did not at the time avail himself of the permission which it involved. On the expiration of that lease a renewal was demanded by the tenant. But the landlord withheld it on the tenant intimating that, notwithstanding the provision as to assignees, he now deemed himself entitled to assign without the control or interference of the landlord. It was decided, in an action of declarator at the instance of the tenant, that the landlord was not entitled to withhold granting a renewal of the

¹ Mor. 15,263. *Per* Lords Hermand and Balmuto, and Session Papers. *Inf.* for Muir, pp. 9-10, in *Muir v. Wilson*, *ut infra*.

² *Per curiam* in *Muir v. Wilson*, *infra*.
³ *Per* Lord President Hope, *id.* 1 Bell on Leases, 183.

⁴ *Grieve v. Cunningham*, *ut sup.*

⁵ *Mackenzie v. Learmonth*, 4 March

1817, n. r., mentioned in a note to *Muir v. Wilson*, F. C. *ut infra*.

⁶ 1 Bell's Com. 78-9; Bell's Pr. 1218. More's Notes, cxlix; 2 Ersk. vi. 31; Note; 2 Stair, ix. Note vi. (by Brodie), *Muir v. Wilson*, 20 Jan. 1820, F. C. 83. [D. of Portland v. Baird & Co., 9 Nov. 1865, 4 Macph. 10.]

lease; but it was held, *first*, that the consent, given at one particular time to assign, could not be extended to a future time when the circumstances under which it was given were changed, and, in particular, that such consent was not binding on the heirs of the landlord by whom it was given; and *second*, that the landlord was not bound to justify or explain any refusal to approve of a proposed assignee, but the right of the tenant was reserved to seek redress, in case at any future time the landlord should capriciously exercise his power of refusal.¹ So in a complicated case, already noted, it was held that under the lease the daughters of the lessee could have no such title as assignation from the heir without recognition or acquiescence on the part of the landlord, and that there had not been such.²

SECTION IX.—EXCLUSION NOT TO BE EVADED BY A DEED IN THE FORM OF A TRUST-SETTLEMENT, OR BY A DELUSIVE DEVICE.

[245] *1st*, A lease for nineteen years was granted to a lessee and his heirs, but excluding assignees and subtenants, except with consent of the landlord. In the third year after his entry the lessee fell into bad health; and after an ineffectual endeavour to transact with the landlord for a surrender of the lease, he executed what he called a deed of trust. In that deed he professed to constitute the grantee trustee for him and his heirs in relation to his lease, and to "convey and make over the same," so far as necessary for the purposes of the trust. He substituted the trustee in his full right and title, with power to manage and transact as he himself would have done. The deed bore, with respect to the provisions of the trust, that certain near relations of the truster should have a house on the lands and a certain portion of the produce, and that the trustee should account to the truster and his heirs, after allowance of payment of rent, advance of money, reasonable expenses, and gratification for trouble. The deed also bore a clause submitting to arbiters named all controversies which might arise between the trustee and the heirs of the truster. Certain steps were taken for the immediate execution of the trust. The truster's death having taken place soon afterwards, the landlord raised a process of declarator against the trustee and the truster's heirs, in which he complained of the trust-deed and the trustee's possession as an

¹ *Wight v. E. of Hopetoun*, 9 Feb. 1855, 17 D., 27 Jur. 158. [See observations on this case in *D. of Portland v. Baird & Co.*, *cit.*]

² *Gray v. Low, &c.*, 21 Jan. 1859, 21 D., 31 Jur. 157. See *supra*, c. vii. a. ii. pp. 228-29, and Note 1, p. 230.

infringement of the clause of exclusion of assignees, and concluded to have that conveyance set aside as null; to have the trustee removed; and to have it found that the trustor's heirs had forfeited all right to the tack. The Court held that the trust-deed was a covert assignation, and therefore decerned in the removing against the trustee. This decision has been held to embody the rule, that a clause excluding assignees is not to be evaded by a deed in the form of a trust-settlement but truly of the nature of an assignation.¹

2d, An agricultural lease contained prohibitions against assignees and sublessees, but allowed the lessee to let the mansion-house. The lessee entered into an arrangement under which a third party was to cultivate the farm by his own servants, horses, and implements. There was no agreement as to remuneration to be given to him for so cultivating it. The lessee himself, with his wife and family, removed from the farm, and he likewise removed all his [246] stock. An application for interdict having been made by the landlord, it was held that this arrangement was substantially an entire cession of possession by the lessee, and that it had every resemblance of being a delusive device to defeat the stipulations in the lease by which sublessees and assignees were excluded. An interdict was therefore granted against the lessee subletting or assigning, and against the third party from occupying or cultivating the farm in any manner whatsoever.²

[So, 3d, When a tenant under a lease excluding assignees granted a deed of factory and commission in consideration of advances by the factor, the deed being irrevocable and giving the factor unlimited power of management, subject to an obligation to account at the end of the lease, it was held that the deed was an assignation, and that an irritancy by which the exclusion of assignees was fenced had been incurred.]³

¹ Porter v. Patersons, &c., 1813, Hume 362.

² Hamilton v. Somerville, 3 Feb. 1865, 17 D. 344. [See a similar case in re-

gard to an urban tenement, Hatton v. Clay, &c., 21 Dec. 1865, 4 Macph. 263.]

³ [Lyon v. Irvine, 13 Feb. 1874, 1 Rettie 512.]

BOOK II.

SUBJECT-MATTER OF LEASE.

AFTER having ascertained who are the parties by and to whom leases can be validly granted, the next object of inquiry is the subject-matter concerning which they generally contract.

CHAPTER I.

GENERAL DESCRIPTION OF SUBJECT-MATTER.

In the Books the subject-matter of which the contract of lease may consist is described either in very general terms—as lands or any other thing having fruit or profit, as a fishing, an office, or a casualty,¹—or there is given a specific description which seldom even approaches to completeness. Combining the enumerations as given in the Books, ancient and modern, the subjects appear to be—*1st*, Lands, rowms, steadings, possessions, yards, orchards, mills, mines, collieries, woods, fishings, water and kelp; *2d*, Saltworks, houses, shops, and manufactories; *3d*, Game; *4th*, Rents, tolls, ferries, railways, customs, and other revenues arising from subjects capable of yielding profits; and *5th*, Subjects with exclusive privilege attached, as church-seats, theatre, the right of selling certain commodities, or of using a particular mark on manufactured goods.² But any enumeration must, necessarily, be incomplete, because the subjects of the contract must vary with the ever-varying state of society. In ancient times leases of rents, casualties, and similar

Land.

Manufac-
tories,
Game,
Rents,
Tolls, &c.

¹ 2 Craig, ix. 23; x. 1 and 2. 1 Stair, 15, and vi. 27. 2 Ross's Lect. 456. Bell's ix. 1 and 3. 2 Ersk. vi. 20. Pr. p. 431, sec. 1177. 1 Bell on Leases, ² Balfour, 200, 201, 204-8. 2 Dallas, 1. 2 Bell on Leases, 241, 244, 245, 247, 509-10. Spot. Styl. 360, 363, 368. 2 249, 251, 280. 1 Jurid. Styl. 4th edit. Bankt. ix. 1, 12, and 19. 2 Ersk. iii. 462, 492, 495-7, and 530.

profits, seem to have been usual and important, whereas in modern times they are rare and unimportant; while, from the increase of manufacturing and commercial industry, there have risen into consequence subjects which anciently were either unknown or insignificant. From the same causes there may now exist subjects regarding which there are not to be found either *dicta* or decisions, [248] and the existence of which can be ascertained only by a minute acquaintance with local usages. While therefore the ordinary subjects of the contract shall be discussed in detail, the enumeration is not given as complete.

CHAPTER II.

LAND.

Land necessarily forms the most important subject-matter of the contract of lease, considered with relation either to extent, or value, or frequency. Its great divisions are into Arable and Pastoral farms. Practical difficulties, where the land is partly under tillage and partly in pasture, arise as to determining what is an arable and what is a pastoral farm. A farm situated in a mountainous district, of which a third part was said to be arable and a very small part of which had ever been under tillage, was held to be pastoral.¹ And it has been held that the criterion of judging whether farms are to be held arable or pastoral is to ascertain the source from whence the profits are chiefly derived.² There are subordinate divisions, as—*First*, Fields or parks (as they are called) let for grazing, especially in the neighbourhood of towns and around mansion-houses. Those fields are occasionally let for a short period for the purpose of aration, but under such stipulations as to management as will ensure the beneficial restoration of them to grass, which is contemplated as their ultimate condition. *Second*, Gardens and orchards. Leases of gardens are not unfrequent, as the nature of the cultivation ensures a fair return; but leases of orchards are little known in Scotland, on account of the very precarious nature of the crop.

¹ *Petley v. Mackenzie*, 1805, Hume 1836, 9 Jur. 163, F.C. 364. *M'Clymonts v. Cathcart*, 14 July 1848, 10 D. 1489, 186.

² *Campbell v. Anstruther*, 20 Dec. 20 Jur. 567.

of materials for upholding the millhouse is a natural service.¹ 4th, Furnishing thatch to the mill, it was at first held, was not, nor could be exacted, without special constitution or possession;² but it was afterwards determined that this service as well as others was inherent in a thirlage established by constitution.³

SECTION IV.—USAGE.

Usage regulates—1st, The extent of thirlage and multure.⁴ Thus [255] 2d, corns given to the beasts which laboured the ground, and corns sold by the labourer of the ground for buying of cattle, and other necessities for plenishing, and other necessities of the ground, were held to be liable, by reason that the inhabitants had been in use to pay multures for all growing corn, with the exception only of those for teind and seed.⁵ But, 3d, By usage during the years of prescription, teinds may be included under the astrictio.⁶ 4th, Upon a proof of immemorial usage, a thirlage of *invecta et illata* was extended to malt brewed, although not made, within the thirl.⁷

5th, In the absence of specification in the deed of constitution the quantity of multure is governed by this rule,⁸ which extends to dry multures also.⁹ 6th, The standard or measure according to which the multure is to be levied will, from usage, be deemed conformable to the original constitution,¹⁰ and will be sustained even although it should exceed that authorised by strict law.¹¹ 7th, The amount of knaveship is also so regulated.¹² 8th, Where any of the suckeners have been in the use of performing mill services, all of them are bound, even those who have not performed them.¹³

¹ Mercer v. Drummond, and Crawford v. Halkerston, *ut sup.*

² Miller v. Cleland, *ut sup.*

³ Bruce Stuart v. Erskine, *ut sup.*

⁴ Robertson v. Shaw, 1742, Elch. (Mult.) No. 10. Robertson v. Shaw, 1744, 5 B. 740. Murray v. McCulloch, 1746. Elch. (Thirlage) No. 2. E. of Hopetoun v. Brewers of Bathgate, 1753, Mor. 16,029. Simpson v. Fordyce's Tra., 1824, 3 S. 225. [Harris v. Maga. of Dundee, 25 May 1863, 1 Macph. 833. Stobbs v. Caven, 14 March 1873, 10 Macph. 930.]

⁵ Cuthbert v. Town of Inverness, 1637, Mor. 15,973.

⁶ McLeod v. Vassall of Muiravonside, 1727, Mor. 10,874.

⁷ Ramsay v. Town of Kirkcaldy, 1680, Mor. 15,984.

⁸ 2 Craig, viii. 7 and 10; 2 Stair, vii. 18; 2 Mackenzie's Inst. ix. 28; 2 Bankt. vii. 38; 2 Ersk. ix. 30. Bruce Stuart v. Erskine, 1741, Mor. 16,020. Elch. (Mult.) No. 7. Robertson v. Shaw, *ut sup.*

⁹ Bruce Stuart v. Erskine, *ut sup.*

¹⁰ Ramsay v. Brewhouse, 1738, Mor. 16,017.

¹¹ Forbes v. Maga. of Inverness, 1672, 1673, Mor. 10,858-61. Muirhead v. Fenars of Uddingstone, 1697, Mor. 10,873. Bruce Stuart, *ut sup.*

¹² Bruce Stuart, as cited in Ramsay v. Brewhouse, *ut sup.*

¹³ Bruce Stuart, *ut sup.*

9th, The time during which the usage must have operated is generally styled "immemorial." Craig appears to hold that twenty or thirty years will be sufficient,¹ but forty years is the period ordinarily specified in the Books and decisions,² which period must, according to analogy, be deemed correct.

SECTION V.—DEDUCTIONS.

A person bound by thirlage to grind malt at a certain mill, and to give for the grinding a certain proportion of the malt grinded, has a right to repayment from the person receiving that culture [256] of the duties paid to Government on the malting of that proportion, when these duties have been imposed subsequent to the constitution of the thirlage.³ The qualification has been subsequently removed; for it has been decided that a person bound by thirlage to grind malt at a certain mill is entitled to deduct therefrom the duties payable to Government, whether imposed prior or subsequent to the constitution of the thirlage.⁴

SECTION VI.—COMMUTATION.

The oppressive and impolitic effects of thirlage, although noticed by lawyers at different periods,⁵ did not become the objects of legislative attention until, by the 39 Geo. III. c. 55 (13th June 29 Geo. III. 1799), upon the preamble that it was very unfavourable to the general improvement of the country, there were introduced the means of gradually abolishing this servitude.

That statute⁶ in substance provides that, *First*, (sec. 1st) a proprietor subject to thirlage may apply to the Sheriff to have the thirlage commuted into an annual payment. *Second* (sec. 1st), The application is to be intimated to all having an interest, including the lessee of the mill. *Third* (sec. 1st), The procedure shall be by adducing before the Sheriff and a jury (specially qualified and chosen in terms of the Act) evidence of the annual value of the thirlage, services, and prestations. *Fourth* (sec. 1st), The verdict shall fix an annual payment in grain, as a compensation for

¹ Craig, *ut sup.*

² Stair, Mackenzie's Inst. Ersk., *ut sup.* Forbes v. Maga. of Inverness, Muirhead v. Feuars of Uddingstone, and Murray v. M'Culloch, *ut sup.*

³ Maga. of Forfar v. Malcolm, 1808, Mor. App. Thirlage, 3.

⁴ Meiklejohn v. Erskine, 31 Jan. 1815, F.C. 185.

⁵ 2 Craig, viii. 6; 2 Ersk. ix. 18.

⁶ 4 Hutch. 251; 2 Ersk. ix. 38, Note †; Bell's Fr. 1036; More's Notes, cccxxviii.-ix.

those rights. *Fifth* (sec. 4th), After having been three years upon record, the verdict shall not be set aside or altered, and the pursuer of an unsuccessful reduction shall pay his opponent's costs.

Sixth (sec. 5th), Upon such a verdict the servitude shall cease; and in lieu thereof the compensation in grain, or, in the payer's option, its value in money, at the rate of the county fiars, shall be paid annually at the mill, or at some other convenient place to be fixed by the jury. *Seventh* (sec. 7th), The commutation to be paid annually at Candlemas, commencing at the Candlemas immediately ensuing the verdict, and the amount of the first payment to be determined by the jury according to circumstances. *Eighth* (sec. 8th), If the mill be let, the commutation shall be payable during the lease to the lessee, who shall accept it as full compensation for his thirlage.

Ninth (sec. 14th), The statute has no operation where [257] dry multure is fixed, unless there are mill services or other prestations or restrictions besides the dry multure.

Under this statute it has been decided that a commutation into a fixed payment in meal is authorised under the statutory term "grain."¹

SECTION VII.—SUSPENSION.

Insuffici-
ency of mill.

If the mill should become insufficient, there is a suspension of the thirlage; and the suckeners are at liberty to carry to other mills such a quantity of grain as their immediate necessities require.²

The older rule was different. The Statute Wilh. c. 9, *de Molendinis*, provides,—“Si molendum sit fractum, vel sine aqua, vel impediatur gelu: molendinarius ibit cum hominibus domini sui in circuitu, et faciet cum eis conventionem de blado et de multura.”³ Balfour refers to this statute in general terms, but gives no explanation of it;⁴ and Craig, after having stated his inability to explain the passage, says that it is apparently adulterated, and hardly capable of exposition.⁵ In all probability therefore it was not of practical operation.

In Stair's time the rule was that, if the insufficiency arose from culpability, the suckeners might go to other mills, being not only

¹ Orr v. Adam, 1822, 2 S. 19.

² 2 Bankt. vii. 59; 2 Ersk. ix. 37; Bell's Pr. 1035; More's Notes cccxviii. E. of Wigton, 1736, Elch. (Mult.) No. 3. Lockhart v. Vassala, 1736, Elch. (Mult.)

No. 2. Landal v. Meldrum, 1745, Mor. 16,023.

³ Skene de Leg. Scot. Stat. Wilh. fol. 5.

⁴ Balfour 496.

⁵ 2 Craig, viii. 10.

free from "small duties," but retaining such out-sucken multures as they paid at the mill to which they went; but if the insufficiency was accidental, they might go elsewhere with what was necessary for the *interim*, and be free of the small duties, but of no part of the multure.¹

In conformity with this rule the insufficiency of a mill as being a "burn-mill," dry in summer, was not found relevant to free from abstraction, unless it had been an insufficiency through the purchaser's fault.² And it was decided that, in case at the time of the abstraction the mill of the barony be not in a condition to serve, the multures shall notwithstanding be due, but not the smaller duties for service.³

The modern rule (already stated) was subsequently adopted as more consistent with a sound and equitable construction of the contract; but it is subject to the qualification that the suckeners must wait for forty-eight hours before they are entitled to go to other mills.⁴

SECTION VIII.—EXEMPTION.

[258] By Statute 2 Robert I. c. 35, all who bought grain out of ships in the King's ports, or from burgesses out of their granaries, were entitled to carry it "*ubi voluerint ad molendinum, et illud bladum habebunt absque contradictione, portando libere et quiete.*"⁵ Lord Kames, upon the authority of Craig, interprets this statute as creating an exemption from thirlage.⁶ In the passage referred to Craig merely recites the words of the statute as being among "*nostros mores*," and contained "*in scripto jure nostro*" upon the subject of thirlage;⁷ but he does not give any explanation of it. The construction, however, put upon it by Lord Kames is apparently sound. Notwithstanding its classification by Craig, as being "*inter nostros mores*," it may well be doubted whether the exemption had ever been in observance, and no trace of it has been observed as having occurred in practice.

The Act 1491, c. 44, ordained that no multure be taken of flour "that cummis furthe of other lands to the port and haven of Leith," nor of that which "cummis to the mercat." As Mackenzie,

¹ 2 Stair, vii. 27.

² *Heritors of John's Mill v. Fenars*, 1686, Mor. 15, 976.

³ *M'Dougal v. M'Culloch*, 28 Feb. 1684, Mor. 8897-8 and 15,987.

⁴ *Bankt. ut sup.*; 2 Ersk. ix. 37, Notes.

E. of Wigton, Lockhart v. Vassals, Lendal v. Meldrum, ut sup.

⁵ *Skene de Leg. Scot.*; Stat Robert I. fol. 46.

⁶ *Kames Stat. Law Abridg.* p. 372.

⁷ 2 Craig viii. 10.

without at all noticing this provision, gives as the whole purport of the statute a separate provision authorising the sale of victual on every day as well as on the market-day,¹ it is most probable that the provision under consideration was never in observance.

Modern
exemptions.

In modern practice the exemptions from thirlage are, 1st, Where the mill of the sucken has gone into decay, and another has been built by the proprietor in a different part of the thirl, the suckeners are not bound to go to it.² So certain lands having been sold under a reservation of thirlage "to the mills of A generally," and there being two mills of A, but the proprietors of the mill having for a period exceeding the years of prescription let the multures of the lands sold to one of the mills, and the proprietor of the lands having, in like manner, bound his tenants to resort to the same mill—and the Court of Session having, in a former process, found the tenants obliged to resort to that mill, but it having been converted into a spinning mill—the Court found that there was no astriction to the other mill on the same property, and that no claim lay for abstracted multures.³ But persons thirled to a mill are not entitled to abandon it on the ground that it is incapable of answering the whole demands of the thirl, without giving notice to the miller by calling upon him to serve them; it being admitted that the mill was capable of grinding all the grain requisite for the demands [259] of the individuals who are pursued for abstracted multures, and that neither the defenders nor any other person had offered grain to be ground and been refused.⁴

39 Geo. III.
c. 35, § 11.

2d, By the eleventh section of 39 Geo. III. c. 35, the inhabitants of towns subject to the thirlage of *invecta et illata* are entitled to purchase a perpetual exemption, upon obtaining, in terms of the statute, the verdict of a jury determining the full value of that right of thirlage in perpetuity, and upon paying to the proprietor of the mill the sum so determined.⁵ Under this clause it has been decided that the exemption may be purchased by the inhabitants of a burgh from the magistrates as representing the community to whom the dominant tenement belongs.⁶

Payment of
dry multure.

3d, From the very nature of thirlage, payment of dry multure confers an exemption from all other astriction. In consequence, he who is infeft for payment of a certain quantity *pro aridis mul-*

¹ Mackenzie's Ob. 108.

² Ballardie v. Bisset, 1781, Mor. 16,063, Hailes 869. [Harris v. Maga. of Dundee, 25 May 1863, 1 Macph. 833.]

³ Webster v. Miller's Tra., 22 Feb. 1828, 6 S. 573.

⁴ Clark's Tra. v. Hill, 29 Feb 1828, F.C. 698, 6 S. 659.

⁵ 4 Hutch. 255-6.

⁶ Bakers of Dundee v. Maga. of Dundee, 1804, Mor. 16,076.

tuirs, is free to carry and grind his grain where he pleases, paying to his over-lord the dry multures contained in his infestment.¹ But although it often happens that dry multure is paid for bear, yet if the bear be brought to the mill, it will pay the ordinary multure paid for oats.² While from special constitution or usage this may exist in particular cases, it seems to be irreconcilable with principle. 4th, The Statute 4 Geo. IV. c. 94, obliges distillers to grind their malt at their own mills, but it does not, either directly or by implication, discharge the vested rights of third parties, nor entitle distillers to establish their distilleries within the bounds of a thirlage, without being subjected to the burdens therein existing.³

SECTION IX.—KILN.

Although a kiln be let as a part of or along with a mill, and although the suckeners resort to the kiln, it does not form part of the thirl, and the suckeners are not astricted to it.⁴

CHAPTER IV.

MINERALS.

Leases of minerals are increasing in frequency and importance, by reason of the greater facilities afforded both for working and [260] transporting mineral produce, and of the rapid augmentation of manufactures.

SECTION I.—GENERAL ENUMERATION OF MINERALS ORDINARILY LEASED.

Those minerals which most frequently form the subject-matter of the contract of lease are Coal, Lime, Iron, Lead, Marble, Granite, Freestone, and the other kinds of ordinary stone, which, together with other inferior mineral productions, it would be unnecessary to specify.⁵ Although gold, silver, tin, and copper,

¹ *Caakiben v. Clark*, 1612, Mor. 15,063.

² *Elphinston v. Leith*, 1749, Mor. 16,026.

³ *Ogilvie and Dakers v. Guthrie*, Mar-

tin, & Co. 1825, 4 S. 288.

⁴ *Skene v. Reddie*, 1775, Mor. 16,063.

⁵ 1 Jurid. Styl. 4th edit. 497, 504-12, 524, and Append. No. viii. and ix.

are enumerated in the Books among the minerals leased,¹ mines of the two former descriptions do not exist in Scotland, but portions of both, particularly of silver, have been found in mines of other metals. If tin mines exist in Scotland they never have been worked, and copper mines are of rare occurrence. The first object granted by the lease is the minerals themselves, described as seams, veins, beds, nests, and by similar technical names.²

SECTION II.—WATER, FUEL, AND OTHER NATURAL ACCOMMODATIONS.

A command of water, fuel, stones for building, and similar natural accommodations is of essential importance in effectually working mines. There is therefore given a right to use streams and rivulets, and, if necessary and warrantable, to turn their courses; and cast peats and cut common wood for fuel, and to quarry stones requisite for the works.³

SECTION III.—MACHINERY, ROADS, AND OTHER ARTIFICIAL ACCOMMODATIONS.

In mining numerous and extensive artificial accommodations [261] are requisite. Mills, engines, pumps, and shafts and levels, dams, drains, aqueducts, and reservoirs are indispensable for working and raising the minerals. Storehouses and granaries, houses and shops, are necessary for the accommodation and supply of the workmen and their families. Roads, waggon-ways, and railways, and, where there is water-carriage, canals, harbours, and quays are requisite for conveyance and export. Where therefore these accommodations already exist, they are granted to the lessee; and if they either do not exist at all, or not in the requisite number or variety, power for their formation is given.⁴

¹ 1 Jurid. Styl. 654, 3d edit. 711.

² Jurid. Styl. and Append. *ut sup.* An example is afforded of the difficulty of giving an accurate, scientific, and practical description of the mineral let, by the recent case of Gillespie v. Russell & Son, 20 June 1857, 19 D. 897, 29 Jur. 415, where a lease had been granted of the coal and other ordinary minerals. The mine was afterwards found to contain a mineral of great value, but regarding the true nature of which there was much difference of opinion among scientific and practical men. The case,

in different shapes and at different times, has been thrice before the Court of Session—17 D. 1, 28 Jur. 277, 18 D. 677, 28 Jur. 243, 19 D. 897, and 29 Jur. 415 [aff. 23 July 1859, 3 Macq. 757, 31 Jur. 641, 21 D. (H. L.) 13]. It is one of those cases which on reading might be deemed to embody matter involving the law of Landlord and Tenant, but which on analysis it is difficult to ascertain involves any specific doctrine under that branch of law.

³ 1 Jurid. Styl. and App. *ut sup.*

⁴ 1 Jurid. Styl. and App. *ut sup.*

SECTION IV.—RIGHT TO EXEMPTIONS AND IMMUNITIES.

For the encouragement of the lessee, the lessor in some instances grants to him, during the term of the lease, the benefit of all exemptions from duties, customs, shore-dues, and anchorage-dues, on the minerals to be raised within the bounds of the mining liberty, so far as he has a right to these exemptions by Act of Parliament or by grant from the Crown.¹

SECTION V.—RIGHT TO SERVICES OF WORKMEN.

In one style of a mineral lease there is inserted a conveyance of the colliers and bearers, but in so far only as the lessor has right to them.² Under the older leases such a clause conferred a substantial and ample right to these workmen. Without paction and *ex vi legis*, they were bound to perpetual service merely by their entering upon work; and in case of sale or alienation, the right of service was transferred, as *fundo annexum*, without an express grant; but a special conveyance was usually inserted.³ On this principle, a bond by which a coal-heaver obliged himself to serve a coal-master during the granter's life was sustained, as being neither *contra bonos mores* nor against Christian liberty.⁴ Although it was decided that colliers working at a coal during a lease became bound to the coal, not to the lessee,⁵ the rule was subsequently so far altered that it was held that colliers might be employed at any coal possessed by their master either as proprietor or as lessee.⁶

[262] The clause of transference in modern leases can be effective only where there is a written contract conferring upon the coal-master, in express and unqualified terms, the power of transferring his servant; for by statute a total change has been made upon the condition of colliers. 1st, The Statute 15 Geo. III. c. 28 (1775), on the preamble of the injustice and impolicy of the existing law, provided that those who began to work after July 1775

¹ 1 Jurid. Styl. 3d. edit. 721.

² 1 Jurid. Styl. 2d. edit. 644.

³ 2 Craig, viii. 17; 4 Stair, xlv. 17; 1 Mackenzie's Inst. vii. 23, Note m; 1 Bankt. ii. 82; 1 Ersk. vii. 61; Tait's Justice of Peace, 57; 1806, c. 11; 1681, c. 56; Mackenzie's Obs. 323, 404; 1701, c. 6. *Vide* Preamble to 15 Geo. III. c. 28.

⁴ L. Capprington v. Geddes, 1632, Mor. 9454.

⁵ Spence v. Scott, 1764, Mor. 2360.

⁶ Clark v. Hope, 1769, Mor. 2362. 135, Hailes 273, 5 B.S. 518. Wemyss v. Colliers, 1763. M. Lothian v. Colliers, 1762, 3 Fol. Dic. 135, noticed in Clark v. Hope, *ut. sup.*

should be no otherwise bound than as other servants; and that those bound at that time should be equally free upon obtaining a decree of freedom in the manner directed in the statute. And the benefit of the Act 1701, which had been denied them, was conferred upon them. 2d, By the 39 Geo. III. c. 56 (13th June 1799), it was enacted that from and after the passing of that Act all the colliers in Scotland who were bound colliers at the time of passing the Act 15 Geo. III. should be free from their servitude, and in the same situation in every respect as if they had regularly obtained a decree in the manner directed by that Act.

CHAPTER V.

SALT-WORKS.

Salt-works are often constructed by coal proprietors or lessees by reason of the advantageous means thus afforded of using certain portions of their coal. Those works are therefore frequently let along with coal-works, and the clauses applicable to both are combined or intermixed.¹ But those works may also be, and are, let as separate subjects.

SECTION I.—MACHINERY AND OTHER ACCOMMODATIONS.

The salt-pans and the water-engine, reservoir, granaries, ginnell, and the whole machinery and utensils, together with the houses attached, are granted.²

SECTION II.—RIGHT TO SERVICES OF SALTERS.

[263] In the style of leases of salt-works, as in that of collieries, there is a clause conveying to the lessees the salters, but in so far only as the lessor has right to them. By the old law salters were in the same condition as colliers.³ In terms of the 15 Geo. III. c. 28, those who began to work after the 1st of July 1775 were to be in

¹ Jurid Styl 2d edit. 644. [Croker v. Stevenson, 5 Feb. 1866, 18 D. 496.]

¹ urid. Styl. *ut sup.*

² Stair, Mackenzie's Inst. and Obs., Bank, Tait, and Scots Statutes, *ut sup.*

the same condition as other servants; but those who were bound at that date might become free after certain periods upon obtaining a decree of freedom before the Sheriff. While the 39 Geo. III. c. 56, abrogated the necessity of colliers obtaining such a decree, it did not include salters, to whom, consequently, the provision continues applicable. But as the instances in which it can be operative must now be very few, details are needless, and a general reference to the provisions of the statute is sufficient.

CHAPTER VI.

WOODS.

Woods, consisting of standing wood and *silva caduca* or coppice-wood, afford, both from timber and bark, a large source of income, and, where extensive, form the subject-matter of a contract which may be classed among leases.

SECTION I.—CAN WOODS BE LEASED.

It has been observed that, although a contract for wood-cutting has been said to partake of the nature of a lease, it is doubtful whether it possesses all the requisites and confers all the rights of the latter contract.¹ The reasons of doubt are that, 1st, In the decisions relating to such contracts the terms generally used indicate contracts of sale.² 2^d, The right of hypothec is rejected.³ [264] 3^d, Instalments belong not to heirs, but executors, and an heir of entail may stop cutting as at the date of his predecessor's death.⁴

The soundness of these objections is questionable.

¹ 2 Bell's Com. 28. 1 Bell on Leases, 420, Note b.

² Cra. of Monsewell v. Children, 1683, Mor. 8253. Pringle v. Scott, 1730, 1 Bell's Com. 52-3, Note, Mor. 5413. Ferguson v. Ferguson, 1737, Mor. 8254, Elch. (Liferenter), No. 1. Lang and Cross v. D. of Douglas, 1751, Mor. 8246. Duke v. Duchess of Hamilton, 1782, noted in Lang and Cross, *ut sup.* L. Cathcart v. Schaw, 1755, Mor. 15,403-4.

Stewart v. Exrs. of Stewart, 1761, Mor. 5436-9. Grey v. Seton, 1789, Mor. 8250. 1 Bell's Com. 52-3, Note. M'Kenzie v. M'Kenzie, 1824, 2 S. 775.

³ 2 Bell's Com. 28, and Bell on Leases, *ut sup.* Muirhead v. Drummond, 1793, cited in 2 Bell's Com. 28.

⁴ Per L. J.-C. M'Queen in Muirhead v. Drummond, *ut sup.* *Sup.* book i. chap. ii. section i. art. 11.

close time in the Tweed extends from 14th September to 15th February for nets, and from 30th November to 1st February for rods.¹]

SECTION III.—LAWFUL AND UNLAWFUL TACKLE AND UTENSILS.

[270] In leasing the tackle and utensils the lessor can grant, and lessee can use, those only which are lawful. For taking salmon "net and coble (or boat) are in all situations lawful, and yairs and stake-nets" are lawful when placed upon the open sea-shore beyond the mouths of estuaries or rivers.²

But when placed or otherwise used within rivers where the sea ebbs and flows, fixed or stationary nets of any kind, and almost every engine or device which may prove highly destructive of salmon, are unlawful, conformably to a long series of statutes and decisions. The leading statutes are—Alex. II. c. 16 (or William the Lion); Robert I. c. 12;³ 1424, c. 10 and 11; 1427, c. 6; 1429, c. 131; 1457, c. 86; 1469, c. 38; 1477, c. 74; 1489, c. 15; 1535, c. 17; 1563, c. 68; 1579, c. 89; 1581, c. 111;⁴ 1685, c. 20; 1696, c. 38; 1698, c. 3. Under these statutes, and at common law, it has been held that there are prohibited—1st, cruives and yairs, and all fixed or stationary apparatus;⁵ 2d, stent nets;⁶ 3d, stoop nets, pock (bag) nets, and berry water nets, upon certain parts of the [271] river Forth;⁷ 4th, hang nets;⁸ 5th, a bulwark or loose wall erected across the channel of the river, having attached a basket or pock net to intercept the fish;⁹ 6th, stake nets;¹⁰ 7th, a yair, while it may be maintained or improved for the purpose of catching herrings or white fish, cannot be converted into a stake net or used as a yair for catching salmon.¹¹ 8th, Where toot, stake, and stent

Fixed
engines pro-
hibited.

¹ [32 and 23 Vict. c. 70, s. 6.]

² Earl of Kintore v. Forbea, 31 May 1826, F.C. 617, 4 S. 641; aff. 1828, 3 W. and S. 261. [Duchess of Sutherland v. Gilchrist, 11 June 1836, 14 S. 959.]

³ Skene's Col. of Acts, fol. 26 and 31.

⁴ Glendook's Acts. Mackenzie's Obs. 8, 29, 98, 165, 197.

⁵ Balfour 543-5; 2 Stair, iii. 70, and Note b (by Brodie); 2 Bankt. iii. 111; 2 Ersk. v. 15, and Notes; 2 Hutch. 570-2 and 579-80. [Stewart on Rights of Fishing, 163-169.]

⁶ Coble Fisher's of Don, 1693, Mor. 14,287. D. Queensberry v. M. Annandale, 1771 and 1772, Mor. 14,279. Colquhoun v. D. Montrose, 1793, Mor. 12,817, 14,281, and 14,282, 4 Pat. 221. Dirom v. Little, 1797, Mor. 14,282.

⁷ Lord Erskine v. Maga. of Stirling, 1763, Mor. 14,268.

⁸ Dirom v. Little, *ut sup.*

⁹ Earl of Fife v. Gordon, 1807, Mor. App. Salmon Fishing, 2.

¹⁰ Earl of Kinnoul v. Hunter, 1803, Mor. 14,301; aff. 1804, 4 Pat. 561. Duke of Athole v. Maule, 7 March 1811, F.C. 537, Buchanan's Rep. 254; aff. 1816, 5 Dow 282. *Id.* v. Eund., 4 Feb. 1817, F.C. 274. Maga. of Dumbarton v. Grahame, 16 Jan. 1813, F.C. 59; aff. 19 June 1816.

¹¹ Maga. of Dumbarton v. Grahame, *ut sup.* Fraser v. Duff, 13 Nov. 1829, F.C. 17, 8 S. 14, where the true intentment of Maga. of Dumbarton v. Grahame is explained.

nets had been used, an interdict was granted against all other modes of fishing except by net and coble;¹ and a similar interdict was granted where there had been used stent nets or bag nets, or other fixed or stationary nets of any description.² 9th, Fishing for salmon in a river or estuary by means of stented nets fastened to the shore and moored and remaining stationary in the water, so as to obstruct the passage of the salmon, and to force or decoy them into courts or enclosures of netting within which they are caught, or by means of fixed machinery, was found to be illegal.³ 10th, [By the Salmon Fisheries (Scotland) Act, 1868, persons using light or fire of any kind, or any spear, leister, gaff, or otter (except a gaff as auxiliary to a rod and line) for catching salmon, or any instrument for dragging for salmon, or having such instruments in their possession under suspicious circumstances, are liable to a penalty of £5, and forfeiture of the article.]⁴

11th, By the 20 and 21 Vict. c. 148, s. 55 (Tweed Fisheries), it is unlawful to use in a river any fixed net or fixed engine, or to take salmon by means of them. And in section second a comprehensive description of the meaning of the words fixed net and fixed engine is given, including "all nets, cruives, engines, or devices of whatsoever construction or materials" which may be used for taking salmon or injuring the fisheries. Salmon-fishing by net and cairn had not been prohibited by the earlier Tweed Acts; and the 11 Geo. IV. c. 54, s. 26 (Tweed Act), declared that it should not be lawful to affix a cairn net to any islet or cairn not connected with or adjoining the banks, or to build a cairn which did not adjoin the bank.

Under these Acts it was held⁵ that previously [272] to the passing of the late Act cairn-nets were not illegal. The Act did not merely affix a penalty to that which was declared illegal before it declared illegality. It created illegality of a new description, and that illegality was confined to the building of a cairn upon an islet or some part of the channel of the river, which cairn shall not adjoin the bank thereof. The cairn-nets at issue were therefore held to be lawful, on the principle that the provisions of the statute declaring a matter previously lawful to be thereafter unlawful, are not to be extended by implication; or, in more specific words, that when a statute, dealing with the particular mode of doing an act,

¹ D. of Athole v. Wedderburn, 1826, 5 S. 153.

² McKennie v. Houston, 1830, 8 S. 726.

³ Lord Gray v. Sime and Johnston, 9 July 1835, F.C. 886, 13 S. 1089.

⁴ [31 and 32 Vict. c. 123, s. 17. See 9 Geo. IV. c. 39, s. 6, and 24 and 25 Vict. c. 97, s. 11.]

⁵ Per Lord Brougham in Duke of Roxburghe v. Ramsay and Others, *ut supra*.

declares the doing of the act in a particular situation to be unlawful, and imposes a penalty on transgression, the inference is that the act, not otherwise unlawful in itself, may be lawfully done in other situations.¹ But by the 2d and 55th sections of the 20 and 21 Vict. c. 148 (Tweed Act), cairn-nets are declared to be illegal when fixed to the soil, or anchored, moored, or fixed or made stationary in any way whatever, and by section fifty-eighth must be removed or destroyed.

12th. Generally it is unlawful to use any apparatus by which the salmon can be deterred or frightened from coming up the river;² and to adopt any other mode of fishing than the ordinary mode by net and coble.³

Where, by reason of the situation, salmon-fishing by yairs is illegal, the Crown cannot by its grant alter or dispense with the public statute law, and no positive prescription can run in favour of or fortify the grant,⁴ [with certain exceptions in regard to the Solway.]⁵

Mill-dam
dykes.

[273] The Statute 1696, c. 33, "discharges all fishing at mill-dam dykes, with nets stented, or otherways, or any other engines whatsoever." This prohibition was held to apply to a fishing upon the river Tweed.⁶ [And the construction of mill-dam dykes must be in conformity with the rules of this statute, and the bye-law of the Commissioners under the Act of 1862.]⁷

Salmon-fishing carried on by means of a check dyke, erected behind a mill-dam dyke and operating as a weir, in water where the sea ebbs and flows, was found to be unlawful and an infringement of this statute.⁸ But it has been decided that fishing near a dam-dyke, but not by means of it and not connected with it, does not come under the prohibition of the statute. For the Court was of opinion that it would be too extensive an interpretation of

¹ Duke of Roxburghe v. Ramsey, 9 Feb. 1848, 10 D. 661; aff. 13 D., H. L. Cases 20, 7 Bell's App. 248.

² Carnegie v. Mags. of Brechin, 1704, Mor. 14, 288. D. of Queensberry v. M. of Annandale, Dirom v. Little, *ut sup.*

³ Lord Gray v. Sime, *ut sup.*

⁴ McKenzie v. Forbes' Trustee, 18 June 1840, F.C. 1167, 2 D. 1078, 18 Jur. 517. With relation to lawful and unlawful modes and places and times of salmon-fishing, *vide* Notes to Stair and Ersk., *ut sup.*; Bell's Pr. 1114-18; More's Notes, cci.-ii. Duchess-Countess of Sutherland v. Gilchrist, 1836, 14 S. 959. Mackenzie and Munro v. Horne, 1837, 15 S. 594; 10 July 1838, F.C. 844,

16 S. 1286; rev. 26 August 1839, M'L. and Rob. 977. Duke of Sutherland v. Ross, 23 June 1844, 6 D. 425. [Stewart on Fishings, 148 *et al.*]

⁶ [See Guthrie's Bell's Pr. 1117 (*f*). Stewart on Rights of Fishing, chap. xvii.]

⁷ Duke of Roxburghe v. Earls of Hume and Tankerville, 29 June 1768, Mor. 14, 272-6; as revd. 1774, 2 Pat. 358. [Forbes v. Leys, Masson, & Co., 9 July 1831, 9 S. 933, 5 W. and S. 384.]

⁸ [Stewart on Fishings, 165. 25 and 26 Vict. c. 97, s. 6. Monro v. Monro, July 7, 1846, 8 D. 1029.]

⁹ Cunningham v. Taylor, 1804, Hume 715.

the statute to include under it a prohibition of all fishings near dam-dykes, which was the description of the fishing in question; and that the statute was only directed against those cases where the dam-dykes were immediately subservient to or made use of in the fishings.¹

SECTION IV.—PRIVILEGES AND CONVENIENCES.

The right of drawing his nets upon the banks of the river is necessarily given to the lessee. Where a grant of a salmon-fishing is made to one who has no land on either side of the river, the grantee, and consequently the lessee, has a right, as a pertinent of the fishing, and without any further title, and although the adjacent lands belong to other proprietors, to use banks for the purposes of his fishing, and also to have reasonable and unnecessary access through the adjoining lands; but the right must be used in the manner least detrimental to the adjoining proprietors.² Where there is a reservation by the proprietor of a salmon-fishing in the charters granted to his vassals, of drawing and drying his [274] own or his lessee's fishing nets upon the vassal's grounds, conform to use and wont, it is regulated by the prior acts of the superior and his predecessors, and not by the practice of fishers in general.³

Drawing
Nets on
Banks.

But notwithstanding these privileges, a right of salmon-fishing does not entitle the proprietor of it, or his lessee, to construct towing-paths on the banks, or to erect "sights," or make any works *in alveo fluminis*.⁴

A conveyance of lands along a river, with a clause of "fishings and pertinents," entitles the grantee, and consequently his lessee, without proving possession, to fish *ex adverso* of his property with trout rods, but not with net and coble, or in any other way that may be prejudicial to the salmon-fishing in the river belonging to another party.⁵

Right of
angling.

Fishers were never *adscripti*. Where such a claim was made

Fishermen
were never
adscripti.

¹ Notes to Stair and Erak. *ut sup.* Copland v. Maxwell, 13 June 1810, F.C. 700.

² 2 Stair, iii. 69; 2 Erak. vi. 15; 2 Hutch. 564. L. Monymusk v. Forbes, 1623, Mor. 14,264, 10,753, 10,840. Blair v. Miller, 22 Nov. 1825, F.C. 22, 4 S. 214.

³ 2 Erak. vi. 15, Note (by Ivory) 85. E. of Kinnoul v. Keir, 18 Jan. 1814, F.C. 515.

⁴ Forbes v. Smith, 1824, 2 S. 721.

⁵ 1 Craig, xvi. 38, at 2, viii. 15; 2 Stair, iii. 69, 876; 2 Bankt. iii. 111; 2 Erak. vi. 6 and 15; 2 Hutch. 562. Carmichael v. Colquhoun, 1787, Mor. 9645. M'Kenzie v. Rose, 26 May 1830, F.C. 635, 8 S. 816, 3 D. and A. 57; aff. 14 May 1832, 10 S. (App.) 863. [6 W. and S. 31. Somerville v. Smith, 22 Dec. 1859, 22 D. 279. Stewart v. M'Barnet, 20 March 1867, 5 Macph. 753; aff. 6 July 1868, 6 Macph. H. L. 123.]

the Court, "finding that there was no law astricting fishers to the ground where they were born, and that the custom was not general, but only in some partiular places, condemned it as a *corruptela* and unlawful, and tending to introduce slavery, contrary to the principles of the Christian religion and the mildness of our government, and found the fishers free to engage with whom they pleased."

CHAPTER IX.

KELP.

Kelp being useful in some manufactures, the sea-ware from which it is made may form a subject of lease independently of the lands upon the shores of which the ware grows; for it is not held to be a pertinent of an agricultural or pastoral farm.¹ In practice [275] leases of kelp-ware alone are occasionally although seldom used.² The kelp-ware is also at times let along with the farm upon the shores of which it grows, under the denomination of the "kelp-shores." The more common practice in the highlands and islands of Scotland is understood to be, that the proprietor retains the shores in his own possession, and employs the tenants and cottars in manufacturing the kelp. But as the use of kelp has of late years been superseded by the introduction of other substances, the manufacture of it is greatly diminished, and leases of it, as of a separate subject, have become very rare.

CHAPTER X.

DWELLING-HOUSES, SHOPS, AND MANUFACTORIES.

SECTION I.—HOUSES AND SHOPS.

In leases of dwelling-houses and shops, if empty, the subject itself is let according to its description for the stipulated period.⁴

¹ J. Woodney or Udney v. Reid and Others, 31 July 1696, and 17 Feb. 1698, Mor. Dic. 4427.

² Campbell v. Campbell, 1795, Mor. 9646.

³ Sinclair v. M'Beith, 1788, Hume 773.

⁴ Spottia. Styl. 360-9; 1 Jurid. Styl. 4th edit. 495 and 496.

If along with it any furniture or other articles be let, the use of those articles is given conformably to an inventory.

SECTION II.—MANUFACTORIES.

As formerly stated, leases of manufactories without a supply of steam-power are comparatively little known in the great manufacturing districts. But using the term in a comprehensive sense, leases of such subjects are occasionally used. They consist either of the building alone, or of the building and the steam apparatus, to be applied by the lessee himself. Other machinery may also be let, as forming an integral part of the subject.

A lease of a manufactory without apparatus, and consisting of the building alone, is necessarily the most simple form of the transaction. In it the subject-matter consists merely of the building, and is precisely similar to that of a dwelling-house or shop. Leases of this nature are, however, rare, as the use of apparatus or machinery of some description is generally included.

[276] Where apparatus or machinery is included, it is specially described, and let conformably to an inventory. The most ordinary apparatus consists of the steam-engine and concomitant machinery. These are specified by their technical names, with the addition of the general terms of the whole other fixed machinery and apparatus (but excluding moveable utensils), all as specified in the inventories docketed and subscribed by the parties as relative to the lease. Where great accuracy is contemplated, plans of the machinery are prepared, on which each portion of the machinery is marked by a number corresponding to the description under the same number in the inventory. A docket is adhibited to the plans.¹

From the rapid progress of manufactures, combined with the division of labour and distribution of capital, there has arisen a subject of lease formerly unknown, which still presents many practical difficulties, and the legal characteristics and results of which are still imperfectly understood. It is a contract for letting out steam-power for the purpose of working the numerous and varied manufactories conducted by means of that agency. This contract, as it has hitherto been known in practice, is of two classes. *First*, Where the proprietor of a manufactory worked by a steam-engine

¹ Appendix, No. xiii. This form is deemed advisable by experienced conveyancers.

has more power than is necessary for his own operations, or, as it is called, has *surplus* power, he contracts with a neighbouring manufacturer who has no engine, but who requires steam-power, to give him, for a stipulated rent and for a definite period, the use of that *surplus* power. Or *second*, The proprietor of a manufactory and steam-engine leases the manufactory either as a whole or in flats to dealers, with or without looms and similar small machinery, while he retains the steam-engine, and as part of the contract of lease stipulates to supply them during its currency with the power requisite to drive the machinery.

Considered with relation to its effects upon the distribution of capital, and the consequent creation of manufacturing stock and industry, this contract has produced important results. Formerly the use of steam-power could be obtained only by the great capitalist who could build or take upon lease a manufactory and its extensive and costly apparatus. But now, as the use of this effective agent is within the power of numerous small capitalists, it is applied much more extensively and to a greater variety of objects.

[277] When steam-power is let without any building attached, it has been held that the contract is not that of lease; but when a manufactory, or part of one, is let along with steam-power, the contract is that of lease. In a question relative to a stipulation in a contract of this nature (to be detailed hereafter), the contract was treated as one of lease.¹ And the purchasers of a cotton-mill having granted leases of different parts of it to different tenants, with a right respectively to a proportionate quantity of power from the steam-engine, the landlord being bound in the leases so granted to keep in repair the buildings and steam-engine, and the tenants to keep in repair the small machinery belonging to them, it was never doubted, in a question between the purchaser and seller, (while it is not noticed in detail) that these contracts were leases.²

In a comparatively recent case some of the legal characteristics of such a lease underwent a full discussion, and one important point was settled by a judgment of the House of Lords, which it is necessary should here be brought into view.³ A proprietor let

Case of
separate
rent for pre-
mises and
for steam-
power.
Cattens v.
Tennent.

¹ Wilson v. Norris, 10 March 1810, F.C. 624.

² Wilson v. Pollock, Gilmour, & Co., 1827, 6 S. 3.

³ Cattens v. Tennent, 6 June 1834, F.C. 360, 12 S. 686; rev. 12 May 1835, 1 S. and M'L. 694. [Compare Kilmar-

noek Gas Co. v. Smith, 9 Nov. 1872, 11 Macph. 53, in which a question arose in a sequestration for the rent of a piece of ground let by the pursuers, with a right to the ammoniacal liquor and tar produced in their works and conveyed by pipes to the defender's cisterns.]

premises for a manufactory, and bound himself to communicate to them a supply of steam-power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water. The rent for the premises was fixed, but the amount of the consideration (called rent in one place and price in another) for the steam-power and water was left to the determination of arbiters. The lessor insisted that his right of hypothec attached, not only to the rent for the premises, but to the consideration, which he called rent, payable for the supply of steam-power and water. In the inferior court the right of hypothec was sustained. The Lord Ordinary altered the judgment, holding that the case was so peculiar that the decision of it could not affect any general rule of practice where there was a *cumulo* rent; but that as here the rents were separate the hypothec did not apply. The Court altered his judgment, and held that the right of hypothec over the *invecta et illata* in the premises let was available in security for the whole consideration, including that for the steam power and water. On appeal this judgment was reversed, and it was decided that the right of hypothec over the *invecta et illata* in the premises let covered only the specific rent fixed for these premises, and not the additional consideration stipulated for the steam-power and water. The *ratio* of the judgment was that there were two separate contracts, one for the use of the premises, which was that of lease, and to the rent payable for which the right of hypothec attached, and [278] the other, that of pure location, the consideration paid for which was not rent, and to which therefore the right of hypothec did not attach.

By this judgment¹ the law is fixed, that where the consideration for the premises is separate from that for the supply of steam-power, the right of hypothec does not attach to the latter; but there is no farther result. Where there is a *cumulo* rent for the premises and steam-power, the contract is confessedly that of lease, including the right of hypothec. Even where hypothec is excluded, the contract is still that of lease; for, as numerous examples prove, the existence of hypothec is, according to the law of Scotland, not essential for the constitution of that contract.

¹ *Catterne v. Tennent, ut sup.* In the marginal abstract of the Report itself the purport of the judgment is erroneously stated; but it is stated correctly in the index of the volume, under the word "Lease." The *ratio* of the judgment of the Court of Appeal was founded on certain doctrines of the law of England relative to demises, and to the

rule that a rent reserved can issue only out of the realty. While it may be deemed presumptuous even to hint a doubt affecting a doctrine laid down from the Woolsack, it may perhaps be surmised that consideration might be advisable before such a doctrine be adopted into the law of Scotland.

Art. 4.—
Subject-matter,
including
the stipulations.

As in leases of this description the subject-matter, independently of the premises, consists of a supply of power created by artificial means, and under the control of the lessor, it is not possible to separate the strict subject-matter of the lease from the stipulations. But before detailing the clauses it is important to mention certain difficulties against which practical men deem that the conveyancer must guard himself in framing leases of this description.¹

First, There must be an explicit description of the subject, comprehending the heritable property strictly so called, and, as incorporated with it, the whole machinery intended to be let.

Second, There must be a distinct and comprehensive specification of the machinery let, for which purpose an inventory is indispensable, and the plan and relative inventory formerly mentioned² is very useful.

Third, The extent of the power let ought, if attainable, to be accurately specified, or if that be not attainable, the use of ambiguous expressions ought to be avoided. The leasing of a certain number of "horse-power" has in many cases created embarrassment; [279] for it has been questioned whether the power necessary for working the great gearing was or was not included. In some leases therefore "horse-power" is not mentioned; but the obligation simply is to supply power sufficient for driving a certain number of looms and the attendant apparatus.

Fourth, There must be a clear stipulation of a *cumulo* rent for the heritable property and the machinery and supply of power, as forming one entire and indivisible subject. A doubt may arise whether a contingent or conditional stipulation for additional rent on supplying an additional quantity of power would be deemed to impart the legal characteristics which would render the right of hypothec applicable to that portion of the rent. In so far therefore as attainable, such a stipulation ought to be avoided.

And *Fifth*, The relative obligations of the parties as to maintaining the premises and machinery ought to be expressed with great precision. The terms "tear and wear," by reason of their flexibility, have (it is understood) given rise to questions. And it is suggested that the terms "deterioration by the ordinary and wonted use of the subject" are preferable.

¹ The details to be given are the results of an examination by the Author, of several leases of this description, and of information very kindly communicated to him by conveyancers and manufacturers intimately conversant with the

subject. The example selected is that of a cotton cloth manufactory, which is the most common. Of course, many of the stipulations, &c., vary according to the nature of the operations.

² *Supra*, a. ii. art. 2 of this chapter.

Subject to the modifications or variations indicated in the preceding observations, the following are the ordinary stipulations:—

1. There are let for the stipulated period the premises within which the power is to be used, conformably to description, consisting of one flat or two or three flats. Art. 5.—
Obligations
on the
Lessor.

2. There is then let the power requisite, which is done by giving right to a proportionate share of the machinery, and of the effect produced by it. The lessor "farther sets, and in tack and assedation lets," to the lessee "the great gearing" erected by him upon the building, with sufficient power from his steam-engine to drive a specified number of patent looms for making cotton cloth, with the preparation for the looms.

3. As the quantity of power, and therefore the expense as well as the preservation of the engine, depend greatly upon the nature of the operations of the lessee, the obligations of the lessor will vary accordingly, and consequently the operations are specified. Thus there is inserted a particular specification of the nature and quality of the cotton cloth, with a declaration that silk or linen may be wrought if it shall require no more power, nor be in any respect more severe upon the engine, boilers, and gearing than the specified cotton cloth; and permission is also given to work plain cotton cloth of a certain specified description, provided the whole looms, preparation, and machinery shall not require more engine-power or [280] steam than may be required for working upon the patent principle. And for the same reason there is inserted a restricted description of the "preparation."¹

4. While the nature, construction, and extent of the machinery will govern the quantity of power required, yet as by different means and devices a disproportionate quantity might be taken, a limitation of the quantity to be supplied is effected by a declaration that the whole machinery, for whichever of the allowed purposes it shall be used, shall not receive more than a specified number of "horse-power," measuring that power according to a certain known and approved standard.² And that if the lessee shall require more power, the lessor (but only if at the time his engine can do so) shall supply the additional quantity needed, at an additional rent

¹ "Preparation" (as its name implies) consists of those machines which are requisite for putting the fabric into the state in which it is placed upon the loom. Those machines are, *first*, dressing-

machines; *second*, winding-machines; and *third*, spinning-jennies.

² The standard generally used is Watt and Boulton's, viz., 33,000 pounds avoirdupois raised one foot high per minute.

for each additional horse-power, calculated according to the standard previously specified.

5. In order to preserve the engine in the condition requisite for securing a continued and effective supply, the lessor obliges himself to keep the great gearing connected with the engine on the outside of the building in repair, clean, and properly oiled from the outside, and without making any such alteration in the wheel-work or great gearing as would alter the speed of the lessee's machinery, to drive the engine at the rate or speed of a specified number of strokes or revolutions in the minute, at the option of the lessee, as nearly as the lessor can bring his engine to the number of strokes or revolutions requisite, and that constantly, and with regular and steady power.

6. Independently of the steam necessary for working the machinery, the lessor obliges himself to supply that which is necessary for heating the premises.¹

7. As the consumption of steam, and consequently the expense of the supply, depend upon the length of time during which the steam is used, it is only during a limited portion of each day that the lessor obliges himself to give the supply; and, for the purpose of regulating the time very specific provisions are introduced.

8. If the engine be not kept going constantly, regularly, and steadily, the lessee is entitled, upon notice in writing, to appoint an engineer to superintend it, to furnish fuel and other materials in order to keep it going at the stipulated rate, and to deduct the whole expense from the rent.

Art. 6.—
*Obligations
on the
Lessee.*

[281] 1st, The rent shall be payable at Whitsunday and Martinmas, however small a portion of the lessee's machinery may be in operation.

2^d, The whole of the lessee's machinery shall be formed according to the most approved construction, and shall not require greater power to drive it than the power specified.

3^d, The lessee shall "constantly" keep the machinery in good order, the means of doing which, by oiling and similar operations, shall be minutely detailed.

4th, Certain portions of the lessee's machinery² shall be so constructed as not to drive the looms more quickly than the rate of speed specified. Where the lessee is allowed to increase the speed

¹ [If this clause be omitted, a subsequent verbal contract to give it can be

proved only by writ or oath. *Stewart v. Clark*, 4 March 1871, 9 Macph. 616.]

² Append. No. xiv.

to a certain extent by means of specified mechanical processes,¹ he must take upon himself the risk of the looms going at the increased rate of speed, the lessor being bound only for the inferior rate.

5th, The lessee must put the machinery within the premises without injuring them.

6th, He shall not be entitled to remove during the currency of the lease any part of the machinery put into the premises without the lessor's consent in writing, and "on finding good and sufficient caution for the payment of the rent and the performance of the obligations incumbent upon him during the whole period of the lease."

7th, On the expiration of the lease the lessee shall be entitled to remove the whole of the machinery belonging to him, but under the declaration that no part shall be removed "until the whole tack-duty, interest, and penalty, if incurred, have been fully paid to the lessor."

8th, The lessee shall be obliged to repair all damage and injury done in erecting and removing the machinery, and shall be obliged to leave the premises in as good order and condition as at his entry, necessary tear and wear excepted.

1st, The lessor being obliged to supply steam for heating the whole premises, and for performing certain operations requisite for the completion of the manufactured goods, the lessee is in his turn bound to maintain the pipe necessary for conveying the steam through the interior, so as to convey the waste steam, as that it may or may not, at the lessor's option, be received again into the [282] boilers, and to have the whole apparatus so constructed as that as little steam as possible may be lost.

Art. 7.—
Classes
applicable
to both
parties.

2d, If the premises, engine, or machinery be totally destroyed by fire or otherwise during the currency of the lease, either party shall be entitled to put an end to the lease. But

3d, In case of partial damage the lessor shall repair the premises, engine, and great gearing, and the lessee the looms and the other machinery. And

4th, Neither party shall be liable in damages in consequence of such accidents if the repairs prestable by each shall be made within a reasonable time; but the lessee shall be entitled to an abatement of rent corresponding to the time lost and the number of looms necessarily prevented from working.

5th, The lessor shall at all times have the power of making

¹ Append. No. xiv.

necessary repairs; and, along with the lessee, the lessor, accompanied by a person of skill (not interested to use or to make known the lessee's inventions), shall be entitled to enter the premises and inspect the machinery, so as to ascertain whether it is in proper working order and condition.¹

Rent clause. In some leases there is a peculiarity in the rent-clause. The mill or other building is let conformably to the ordinary terms of description, together with the use and privilege of looms and other machinery belonging to the lessor, and together also with the power of the steam-engines, to the extent sufficient for driving the looms and other machinery. In the rent-clause no rent is made payable for the premises themselves, but only a yearly rent, consisting of a certain sum for each loom, payable quarterly. Whether under such a lease the right of hypothec would attach, might admit of serious doubt if the interpretation be governed by the principle recently laid down in the last resort.²

Art. 8.—
*Explanation
of Clauses.*

While many questions have arisen relative to the interpretation of the clauses of such leases, there are very few judicial determinations, as most of the questions have been decided on references to men of skill.

But, *first*, in construing a lease of this nature it was decided that a stipulation to make up stoppages, either by extra work or by a deduction of rent, does not include extraordinary stoppages, but only those of common occurrence; that the lessor must be held to warrant the condition of his engine; and that the lessee is entitled to damages to the extent of the loss which he may sustain by any imperfection or fault in the engine.³

[283] *Second*, A party let certain premises as a manufactory with the half power of a steam-engine. The lessee was bound, *1st*, to "pay one-half of whatever expense is incurred in keeping the engine at work and in good repair, the other half to be paid by the landlord, each having a right to use one-half the power in their respective establishments;" and *2d*, he was bound to "take the said premises as they are, and leave them in like good order, ordinary tear and wear excepted." It was held, on construing the missive of lease taken in connection with the state of possession at the date of entry, that the great gearing of the engine, which communicated the power to the premises of the lessee as

¹ Append. No. xiv.

² *Cattermole v. Tennent*, *ut sup.* art. 3.

³ *Wilson v. Norris*, 10 March 1810, F.C. 624.

well as those of the lessor (who used the other half of the power), was meant to fall within the lease, and that the lessee was not bound to fit up separate great gearing for himself, or to repair the gearing appertaining to the engine when it had given way.¹

And, *Third* (as already noticed), The doctrine has been established, that the right of hypothec does not attach under the consideration stipulated for the steam-power if that consideration be separate from the rent for the premises.²

CHAPTER XI

STEAM-POWER WITHOUT BUILDING ATTACHED.

Where the steam-power is let independently of the building within which it is to be used, while the contract is certainly that of location, it has been ruled that it is not that of lease. The proprietor of a snuff manufactory, in which there was a steam-engine of considerable power, entered into a contract with the proprietor of a contiguous power-loom factory to give him the use of the *surplus* power of his engine. The party receiving the supply, having fallen into arrear of the stipulated remuneration and become insolvent, gave a charge to compel the continuance of the supply of power which had been withheld by the proprietor of the engine. In a suspension the proprietor pleaded that he was not obliged to continue the supply of power, which required a constant outlay, while the charger did not perform his part of the contract by payment of the stipulated rent; and that the agreement was not of the nature of a lease of lands, but of a contract of hiring, as of the [284] use of so many horses daily, which might be abandoned if the party failed to perform. But he offered to continue the supply of power on caution being found for the rent. The charger pleaded that this was like an ordinary contract of lease, and that he could not be deprived of the possession of the subject let merely by falling a year's rent into arrear.³ On deciding the cause it was said, that although the contract was of a novel description, yet it had not the least resemblance to the contract of lease, but was merely an agreement for a supply of power, and that the proprietor had no security for his rent in the way of hypothec, as an ordinary

Auld v. Baird.
Stoppage of power for arrears of rent.

¹ *Walker v. Turnbull*, 7 July 1843, 5 D. 1334, 15 Jur. 580.

² *Catternes v. Tennant*, *ut sup.*

³ *Auld v. Baird*, 1837, 5 S. 264.

landlord had, to continue to give a supply of steam-power when the other party is in arrear and without caution; but that if the charger paid the arrears or found caution for them and the current rent, he might be entitled to get the power supplied, but not otherwise. Accordingly the bill of suspension was passed *simpliciter*, thus determining that the proprietor was not bound to continue the supply. This judgment was subsequently held, by the authority of the highest judicature, to be undoubted law.¹

CHAPTER XII.

FIXTURES.

The subjects of the contract of lease which have hitherto been discussed relate to the soil or its adjuncts, while those which are to follow, although ranged under this contract, partake more of the nature of assignments or communications of personal privileges, and convey no right to the soil or its adjuncts. At this point, therefore, it is proper to examine the doctrine of fixtures.

SECTION I.—PRINCIPLE OF DOCTRINE OF FIXTURES.

Nature of
fixtures and
rights
thereof.

In all subjects in which the contract of lease is connected with the soil or its adjuncts there must, for the useful occupation of them, be erections, external and internal, which are more or [285] less intimately connected with the subjects. When a subject is let, the lessee is entitled at common law, and independently of stipulation, to have along with it those appendages which are necessary for the useful and profitable occupation of it. In Scotland care has frequently been taken to provide against anticipated difficulties by stipulations enumerating the articles (when few, in the body of the contract, and when numerous, by a reference to an inventory), to which it is conditioned that the lessee shall acquire right, as included under the subject-matter. Along with the specification there is a general reference to the state of the subject as possessed by the occupant immediately previous to the incoming tenant, viz., the landlord himself, or the outgoing tenant,

¹ *Cattermole v. Tennent, ut sup.* In the first edition of this treatise the Author ventured to indicate doubts of the soundness of the doctrine laid down in

the case of *Auld v. Baird*. But after the opinion expressed from the Woolseck it would be presumptuous to retain the passage.

as the case may be. But in applying this general reference recourse must necessarily be had to the common law relative to fixtures, in order that it may be determined what articles put up by the former occupant must, by remaining, accrue temporarily to the lessee, or by separation cease to form a part of the subject.

The doctrine of fixtures therefore is of great practical importance, but it is of difficult development; for it depends upon the combination of complicated and subtle principle with the details of almost every branch of industry in which fixed capital is employed. In its application it is necessary to unite the rules of strict law with maxims dictated by equity, and modifications arising from extensive and varied expediency, mechanical practice, and local usage. Nor can the discussion be confined to the municipal law of Scotland, because hitherto comparatively few cases have occurred in which the principles have been examined, and none directly between lessor and lessee, in which their practical application has been settled.

Recourse to foreign laws.

In consequence, it is not only admissible, but requisite, to have recourse to the laws of other countries. On a subject of this nature the analogy must be strong and useful, because the leading applications of the doctrine of "moveable and immoveable" must be recognised by all nations conversant with the law of succession and location, [286] although in different countries there may exist arbitrary rules created by circumstances peculiar to each.

The principle which forms the basis of the doctrine of fixtures is, that whatever is requisite to render the premises, as such, entire and complete, by being either inseparably attached or so constructed and fitted as necessarily to establish the intention of being for perpetual use, is a fixture; while whatever is calculated merely to furnish the premises, by being separable and designed to be separated, is not a fixture.

Principle of the doctrine of fixtures.

In developing and ascertaining this doctrine there are four classes of cases in which it is embodied, and from the separate examination and complex view of which there must be derived the rules which govern its application to the contract of lease. These cases are, *first*, as between heir and executor; *second*, as between fiar and liferenter; *third*, as between heritable and personal creditors; and *fourth*, as between lessor and lessee.

Application of the principle to four classes of cases.

In the *first* class the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex and to consider as personal anything which has been annexed to it. Thus it was held that the machinery in an iron-foundry, erected by the proprietor of the ground on which it was built in performance of a

Heir and executor.

covenant on that behalf contained in a lease granted by him to a company of which he himself was a partner, is heritable in a question as to *legitim*; but that machinery erected by a tenant, and removable by him at the expiration of his lease, is movable in such a question.¹

Far and
liferenter.

The right of fixtures is, in the *second* class, considered more favourably for executors than between heir and executor, because the occupation being necessarily temporary, it is held to have been the *voluntas* of the liferenter that the value should accrue, not to the far, but to his personal representative.

Heritable
and personal
creditors.

A considerable relaxation of the rule ought apparently to be made in the *third* class, where the contest is between an heritable creditor who has obtained a security over the subject containing the machinery, and the personal creditors who have contracted upon the faith of the general trade of the dealer, of which trade his machinery is the principal instrument.

Heir and
executor.

But in the *fourth* class, between lessor and lessee, the greatest latitude and indulgence have always been shown in favour of the tenant's claim, to any particular articles being considered personal as against the claim of the landlord.

["In a question of landlord and tenant the law is less rigid in favour of the landlord, and more in favour of the tenant, than in other classes of cases. . . . As new branches of trade arise, new uses of land arise, and as heritable subjects may become part of the property of a trading company, they may be applied to uses intended to be more or less permanent. The law in respect to use arising out of such occupation must accordingly adopt itself in virtue of the expansive power it possesses to the changes that take place in the course of time. It is not fixed by statute, and must be applied to particular cases, with regard to the whole circumstances in each instance.""]

Equity and expediency will not allow that a person possessing under a temporary contract of occupation should be deprived of those articles which he has put up for his own benefit, accommodation, or comfort, unless it shall be ascertained that they are solidly fixed or that they cannot be removed without injury to the property of the landlord, in which case it is presumed that, by the use which the lessee has had of those [287] erections or articles he has been repaid, and that from the first he was contented to rest satisfied with that as his remuneration.²

¹ *Flaher v. Dixon*, 26 June 1845, 4 Bell's App. 286.

² [*Per* Lord Colonsay in *Syme v. Harvey*, 14 Dec. 1861, 24 D. 202, 210.]

³ This doctrine is derived from com-

paring authorities, of which the following are the principal:—Pothier, *Œuvres* Posth. tom. ii. pp. 638-42. Pothier, *de Droit Civil*, tom. iii. pp. 507-9 and 514-15. Woodfall on Landl. and Ten. 317.

SECTION II.—ROMAN AND FOREIGN LAW.

Under the Roman law, questions involving the doctrine of ^{Roman law.} "movable and immovable" subjects arose chiefly with relation to sale and succession; but they appear to have been deemed applicable to the contract of location, which by the Roman jurists is always nearly assimilated to that of sale. The doctrine was, that movable subjects which formed essential parts of an immovable subject, and were necessary for completing its purpose, were considered to be accessories to it, whether actually fixed to it or not, and were distinguished from mere implements or furniture. Olive-mills, vine-props, manure, pipes, cisterns, keys, shutters, and bars, paintings on the walls or ceilings, statues in niches, and many similar objects, were deemed immovable; while those implements and articles of furniture (of which an enumeration would be needless), which were obviously for the temporary accommodation or comfort of the occupier, were deemed movable.¹ The same views are given by modern commentators.²

According to the laws of the Middle Ages, the rule appears to ^{Medieval laws.} have been adjusted upon the principle of accession, but generally modified by equitable considerations. By the laws of the Lombards, if one erected a building (a mill is the example) upon the ground of another, he was to lose his building and all his work.³ Agreeably to the laws of the Visigoths, if a person built a house or planted vines or olives, or formed gardens or orchards upon the ground of another, they belonged to himself if done with the consent [288] of the proprietor of the soil, given either directly or ascertained by long acquiescence; but if done against the will of the proprietor of the soil, they belonged to him.⁴ Conformably to the Assize of Jerusalem, if any one took, for a rent, the ground of another, for the purpose of erecting a house or other building, and

232. Amos and Ferard's Law of Fixtures, c. 1; c. 2, sec. 1-2; c. 3, sec. 1-3; and c. 4, sec. 1-2. 1 Bell's Com. 752-5. Lawton v. Lawton, 3 Atk. 12. Lawton v. Salmon, 1 Hen. Blackst. 259, Note a. Lord Dudley v. Lord Ward, Amb. Rep. by Blunt, 112. Penton v. Robert, 3 East. 87. Elwes v. Maw, 3 East. 38. Buckland v. Butterfield, 4 Moore 440; per Tindal, C.J., and Patteson, J., in Grymes v. Bowerin, M. & P. 143 and 146. Arkwright v. Billinge, 3 Dec. 1819, F.C. 8, 52. Niven v. Pitcairn, 6 March 1823, F.C. 204, 2 S. 270. Dixon v. Fisher, 6 March 1843, 5 D. 765, 16 Jur. 394.

¹ Dig. L. xix. t. i. l. 13, s. 31, and l. 17, s. 2, 3, 7, 8, 11; L. xxxiii. t. vii. l. 13. a. 23, 24, 25, t. x. l. 14; L. 50, t. xvi. l. 242, s. 4.

² Paulus Voet. de Rebus Mobilibus et Immobilibus, cap. iii. s. 2; cap. iv. s. 1, 2; cap. v. s. 1, 4, 8, 9, 10; cap. xv. s. 10. Voet ad Pandect. L. i. t. viii. s. 13, 14. Heinecc. Inst. L. ii. t. ii. s. 389.

³ Leg. Longobardicæ (Regis Rotharis), capitulum i. s. cli. et. Not. Leg. Barbar. tom. iv. p. 73.

⁴ Leges Visigothorum, lib. x. tit. i. s. vi. Leg. Barbar. tom. iv. p. 175.

afterwards discontinued payment of rent, either from inability or from a wish to sell, the rule was, that he might remove or sell the building, unless the lord of the soil would either give him the value which he put upon it, or was willing to purchase it for as much as would have been given by any one else, in which case he had the right of pre-emption.¹

Spain.

In Spain there exists the general doctrine of acquisition by accession, qualified by an obligation of recompense, according to which the lessor or landlord ought to satisfy the lessee or tenant for the value of improvements which by his industry the value of the property rented by him has undergone.² The same general rule appears to have place according to the law of Holland.³ By the law of Flanders, "*grandiores arbores fundo hærentes mobilibus adnumerari solent.*"⁴ This rule, applicable *a fortiori* to smaller plants and shrubs, probably arose from the capital which in that country was invested in horticulture.

Holland.

Flanders.

France.

On the subject of "moveable and immoveable" the law of France is full and precise, and it has been practically taken into consideration in the Courts of Scotland.⁵ The general rule is that property is immoveable, either by its own nature or by its destination, or on account of the thing to which it is attached. In applying that rule to agricultural subjects, it is held that not only buildings are immoveable, but by destination, animals employed in husbandry, farming utensils, seeds given to farmers, and straw and compost. In manufacturing subjects there are immoveable—windmills and watermills fixed upon pillars, and making part of the building; and by destination, presses, boilers, alembics, vats, tuns, and the apparatus and utensils of forges, papermills, and other works. In houses and other buildings effects are deemed to have been attached in perpetuity when they are fastened with plaster, with lime, or other cement, or when they cannot be detached without being fractured or damaged, or without breaking or injuring that part of the property to which they are affixed. Glasses of an apartment are deemed to be put up in perpetuity where the framework in which they are fixed [289] forms part of the wainscoting. It is the same with pictures and other ornaments. As to statues, they are immoveable where they are placed in a niche made on purpose to receive them, although they may be taken away without fracture

¹ Assise Regni Hierosolymitani, Curie Inferioris, a. cccxiv. Leg. Barbar. tom. ii. pp. 530-1.

² Instit. of Civ. Law of Spain, by Del Rio and Rodriguez, translated by Johnston, pp. 102-3 and 238.

³ Instit. of Laws of Holland, by Van

Der Linden, transl. Henry, p. 119, and Note 4. De Groot, Inleid, § B. 10, D.

⁴ Voet, ad Pandect. L. i. t. viii. s. 14. Instructio Curie Flandricæ, art. 351, 352.

⁵ Arkwright v. Billinge, and Niven v. Pitcairn, *ut sup.*

or injury. And pipes for bringing water into a house or other heritage are immoveable, and form part of the soil to which they are attached. But all things in use, not fixed upon pillars and not forming part of the house, are moveable.¹

SECTION III.—LAW OF ENGLAND.

Attention to the law of England is peculiarly requisite, by reason of the number of cases which it contains embodying rules which have been deemed of practical application in this country.²

With relation to lessor and lessee, the general rule is that which obtains between heir and executor, viz., against the right to disannex and consider as personal anything which has been annexed to the freehold.³ In consequence, where a lessee, having annexed anything to the freehold during the term, afterwards takes it away, it is waste, or, in other words, the thing so annexed is a fixture.⁴ Articles standing merely by their own weight are not fixtures.⁵ But, as will immediately appear, several exceptions and modifications have been engrafted upon this rule.

The application of the rule, and the exceptions and modifications, shall be discussed with relation to, 1st, Agricultural subjects; 2d, Horticultural; 3d, Commercial, including manufacturing and mineral; and 4th, Urban.

[290] A recent statute has made a material alteration on the law of England relative to agricultural fixtures. It is the 14 and 15 Vict. c. 25, entitled, An Act to improve the Law of Landlord and Tenant

Art. 1.—
General
rule.

Art. 2.—
Agricultural
subjects.
14 and 15
Vict. c. 25.

¹ Pothier, Œuvres Posth. et de Droit Civil, *ut sup.* Sec. I. of this chap. p. 296. Code Napoleon, b. ii. tit. i. chap. i. and ii. vol. ii. pp. 109-12.

² Bell's Com. and cases of Arkwright v. Billinge, Niven v. Pitcairn, and Dixon v. Fisher, *ut sup.*, sec. I. of this chap. p. 296. A valuable summary of the practical rules and directions relating to fixtures between landlord and tenant, conformably to the law of England, is given in the Appendix to the Treatise by Amos and Ferard on the Law of Fixtures, of which a high opinion is entertained in England. In referring to the law of England, the Author does not contemplate a full or precise examination of the subject. Throughout, the English judges them-

selves feel the difficulty of ascertaining a governing principle. A Scotch lawyer must therefore be excused if having experienced serious difficulty he has proceeded with diffidence.

³ 4 Co. 64; Co. Lit. 53, a. Cooke v. Humphrey, Moore 177; *sic* in Amos and Ferard. Lord D'Arcy v. Aswick or Asquith, Hobarts 234. Bull. Nisi Prius, 34, *per* Lord Ellenborough, C. J., delivering the opinion of the Court in Elwes v. Maw, 3 East R. 38. Woodfall 318, 326. Amos and Ferard, (2d edit. 1847), pp. 19, 20.

⁴ *Per* Lord Ellenborough in Elwes v. Maw, *ut sup.*

⁵ Mather v. Fraser, 2 Kay and J. 536, 2 Jur. N. S. 900, 25 L. J. Ch. N. S. 361.

in relation to Emblements, to Growing Crops seized in Execution, and to Agricultural Tenants' Fixtures (24th July 1851.) The fifth section bears, that "nothing in this Act shall extend to Scotland;" but as in questions of fixtures the common law of England has been deemed to be practically authoritative in Scotland, as based on general principle, it is well that the section of the statute relative to agricultural fixtures should be cited, because, although not obligatory in Scotland, it affords valuable matter for consideration, as shewing what has been held to be advisable in England.

14 & 15 Vict.
c. 26, s. 3.

The third section enacts "that if any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense erect any farm-building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf) then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removeable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed: Provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same."

Agricul-
tural lessee
cannot re-
move build-
ings erected
by himself.

The general rule of the common law is, that a lessee for mere agricultural purposes has not a right to remove buildings fixed to [291] the freehold which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade

whatever, and to which description of buildings no case deemed a precedent has hitherto extended the indulgence (to be hereafter detailed) allowed to lessees in respect to buildings for the purposes of trade.¹ Where therefore a lessee in agriculture had erected at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled and let into the ground, it was ruled that he could not remove the same though during his term, and though he thereby left the premises in the same state as when he entered.² This case was decided after full consideration, and the judgment, containing a very ample and perspicuous statement of doctrine, is held to have fixed the law.³

But where erections for agricultural purposes are not fixed into the ground, but are of such a nature as obviously to be moveable, they do not constitute fixtures. An agricultural lessee had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, and upon proof that it was usual in the particular county to erect barns so, in order to carry them away at the end of the term, a verdict was given for the lessee.⁴ But it has been said, that although in that case the Court⁵ thought proper to take advantage of the custom of the country, yet that it would now be determined in favour of the lessee without any difficulty, for of late years many things have been allowed to be removed by lessees which would not have been permitted formerly.⁶ And it has been laid down that to be sure the lessee might take away the erections, and that without any customs, for the terms of the statement excluded them from being considered as fixtures—"they were not fixed in or to the ground."⁷ Where the subject-matter consisted of a wooden stable which stood upon rollers, a shed which he had himself built in brickwork, and some posts and rails which he had also erected, it was laid down upon the trial that the lessee would clearly have been entitled to take away the above-mentioned articles if he had done so during the continuance of his term from year to year; but that by an agreement the parties had made a new contract, which put an end to the term.⁸ With relation to the wooden stable upon

Unless they
be buildings
not fixed to
the ground.

¹ *Per* Lord Ellenborough in *Elwes v. Maw*, *ut sup.* *Amos and Ferard*, p. 50, *et seq.*

² *Elwes v. Maw*, *ut sup.* *Woodfall* 325-30.

³ *Woodfall* 325.

⁴ *Culling v. Tuffnal*, at *Hersford*, 1649, *Buller's Nisi Prius*, 34.

⁵ *Treby, L. C. J.*

⁶ *Buller, ut sup.*

⁷ *Per* Lord Ellenborough in *Elwes v. Maw*, *ut sup.*

⁸ *Per* Gould, J., in *Fitzherbert v. Shaw*, 1 H. BL 268.

rollers, no doubt of the soundness of this opinion appears afterwards to have been indicated; but doubts were [292] indicated as to its soundness with relation to the other erections, and the question, it was subsequently held, could not have come judicially before the Court.¹ So, with regard to those erections, the doctrine was deemed *obiter*; and although the question appears to be open, it may be inferred from the tenor of the judgment in the subsequent case² that such erections would probably be deemed to be fixtures.

Where the erection is not inserted into or otherwise affixed to the ground, the rule that it is severable is deemed to be settled. A windmill was rented. It was of wood, and had a brick foundation; but the wood was not inserted into that foundation, and rested upon it by its own weight alone. No part of the machinery of the mill touched the ground or any part of the foundation. It was held that the windmill, not being fixed to the freehold nor to anything connected with it, was not parcel of the tenement. The case related to a right of settlement, and was not between landlord and tenant. But it was conceded that the mill in question was that description of erection which, if set up by the tenant himself, he would be at liberty to remove at the expiration of the term.³ This case was deemed to have fixed the law; and accordingly it was afterwards held that a tenant was entitled at the expiration of his term to remove a wooden barn which he had erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone.⁴

Art. 8.—
Horticultural sub-
jects.

Nursery-
men's right
to remove
plants,

In so far as relates to the removal of plants by gardeners or nurserymen, the right to remove is deemed to be undoubted. For they are entitled to sell and remove trees, shrubs, and the other produce of their grounds planted by them with an express view to sale.⁵ And it was ruled in a recent case that fruit-trees, although they were in full bearing, yet if planted by a nurseryman in the way of his trade, might be removed by him at the expiration of his term, provided they might be fairly considered as nursery trees, and were not of larger growth than would be dealt with by him in his trade as a nurseryman.⁶ But it was held that a tenant of garden-ground could not plough up strawberry beds in full bearing at the conclusion of his term, although he had purchased them of a pre-

or plough up
strawberry
beds.

¹ *Per* Lord Ellenborough in *Elwes v. Maw*, *ut sup.*

² *Elwes v. Maw*, *ut sup.*

³ *Rex v. Otley*, 1 B. and Ad. 161.

⁴ *Wansbrough and another v. Manton*, 4 Adol. and Ell. 884.

⁵ 7 Taunt. 191, and *per* Heath, J., in *Windham v. Wey*, 4 Taunt. 316.

⁶ *Amos and Ferard*, 68-9. Wardell v. Usher, 3 Scott's N. R. 508.

ceding tenant, and although it was proved to be the general practice to appraise and pay for these plants as between outgoing and incoming tenants.¹ [293] That case, however, cannot be deemed to involve doctrine impugning the general rule, as it was considered that the ploughing up of the plants was an injury maliciously done to the reversion, because the plants were not removed by the tenant for sale in his ordinary occupation, but were destroyed without any reasonable object.²

If a private person, or one who occupies land as a farmer and does not profess to be a nurseryman or gardener, raises young fruit-trees on the demised land for the purpose of planting in his garden or orchards, he is not entitled to sell or remove them at the end of his term.³ So a tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord.⁴ And it has been observed that there is no authority for saying that an ordinary tenant may take up growing trees without a special agreement for that purpose.⁵

Right of tenant, not a nurseryman, to remove fruit trees.

Although in the neighbourhood of the metropolis and of other great towns capital to a large amount is invested in horticultural subjects, no precedent involving general doctrine has been discovered relative to erections and appendages. But there are *dicta* proceeding from very high authority, and decisions which by analogy or inference may afford *data* for ascertaining the rule. In one case (touching a varnish-house with a brick foundation let into the ground, and a wooden superstructure) it was asked, "Shall it be said that the great gardeners and nurserymen in the neighbourhood of the metropolis who expend thousands of pounds in the erection of greenhouses and hothouses, &c., are obliged to leave all those things upon the premises, when it is notorious that they are permitted even to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated."⁶

Green-houses and buildings for gardening purposes.

As regards the removal of greenhouses, hothouses, and similar erections fixed into the soil, doubts seem to have been afterwards entertained of the soundness of the *dictum* cited; for it has been said that there exists no decided case and no recognised

fixed to soil.

¹ *Wetherall v. Howells*, 1 Campb. 227, *Amos and Ferard*, 68-9.

² *Amos and Ferard*, 69.

³ *Per* Heath, J., in *Windham v. Wey*, *ut sup.*, and *Amos and Ferard*, 69.

⁴ *Empeon v. Soden*, 4 B. and A. 655.

⁵ *Per* Parke, J., in *Empeon v. Soden*, *ut sup.*

⁶ *Per* Lord Kenyon, C. J., in *Penton v. Robert*, 2 East. 87.

opinion or practice to warrant such an extension,¹ which doubt was repeated in a subsequent case.² But it has been said that "there seems to be no reason why hothouses should not be removed as well as trees in a nursery ground, at least on the principle of trade."³

A middle course might, in a great measure, reconcile the [294] rule of strict law with the modifications which equity or expediency appear to require. The parts actually annexed to the soil might be deemed immovable; but those formed of wood and glass, together with the apparatus for heating, might be held movable in law, as they are in reality.

In a recent case this distinction has apparently been recognised. A rector erected in the garden belonging to a rectory-house two hothouses. They consisted of a brick wall two feet from the ground, upon which were placed the frames and glass-work, the frames being bedded with mortar on the wall. The glass-work was made to slide up and down by pulleys, and was in no way fixed. After the death of the rector his executors removed the frames and glass-work, doing no damage beyond that done to the mortar in the removal; but the succeeding rector took possession of them under a claim of right, and the executors thereupon brought an action to recover their value. It was held that the deceased rector in his lifetime might have removed the frame-work and glass-work, and that the frame-work and glass-work, being removable without injury to the freehold, passed as a personal chattel to the executors, and were removable by them within a reasonable time.⁴

But it was ruled that where there was a covenant to yield up at the expiration of the term all erections and improvements erected, made, or set up during the term, the covenant was broken by the removal of the sashes and frame-work of a greenhouse erected during the term, the frame-work of which was laid upon the walls built for the purpose of receiving it, and imbedded in mortar thereon.⁵ The gist of this case apparently lies in the construction of the covenant, and may therefore be deemed to be special.

¹ Lord Ellenborough in *Elwes v. Maw*.

² *Per Dallas, C. J.*, in *Buckland v. Butterfield*, 4 Moore 440.

³ *Amos and Farard, sup.*

⁴ *Martin v. Roe*, 3 Jur. N. S. 465; 7 E. and B. 237; 26 L. J. Q. B. 129. It was held likewise that the brick wall might have been removed or been left

out of repair without rendering the rector's personal representatives liable in dilapidation; but as the Author understands the case, this point depends upon law other than that of fixtures.

⁵ *West v. Blakeway*, 3 Scott's N. R. 199, 218; 3 M. and Gr. 729; 9 Dowl. 846.

The general rule that whatever a lessee annexed to the freehold became a fixture had at a very early period several exceptions and modifications attempted to be engrafted upon it in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade.¹ After some fluctuations it was held that the law will make the most favourable construction for the lessee where he has made necessary and useful erections for [295] the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. And the rule that the lessee was entitled to remove them became fully established.²

Art. 4.—
Commercial
subjects, in-
cluding
Manufacturing and
mineral.

Exceptions
in favour of
trade.

On these principles it has been ruled, *first*, That during the term a soap-boiler might well remove the vats, coppers, and other implements which he had set up in relation to his trade, but that after the term they became a gift in law to the lessor, and were not movable.³ *Second*, A fire-engine erected to work a colliery may be removed.⁴ *Third*, A cider-mill is removable, which was said to be a mixed case between enjoying the profits of land and carrying on a species of trade, the cider-mill being considered as properly an accessory to the trade of making cider.⁵ *Fourth*, The coppers, furnaces, and other utensils of a brewhouse come under the same rule.⁶ *Fifth*, Pans for manufacturing mineral salt, made of hammered iron, and capable of being taken to pieces, fixed upon two pieces of brickwork, but not to the walls, would, it was held, be removable in a question between lessor and lessee.⁷ And it was deemed that stoves, cooling-coppers, mash-tubs, water-tubs, and blinds, were removable as between landlord and tenant.⁸ "Nothing indeed," it has been observed, "was said in the case as to the mode of annexation of the articles; but it must be presumed from the nature of the dispute that they were in some way affixed to the freehold."⁹

Examples

Sixth, Where a lessee covenanted to yield up in repair at the expiration of his lease all buildings which should be erected during the term upon the premises demised, the covenant was held to include buildings erected and used by the lessee for the purposes of

¹ *Per* Lord Ellenborough in *Elwes v. Maw*.

² *Per* Holt, C. J. in *Poole's case*, Salk. 368. Lord Hardwicke, C. in *Lawton v. Lawton*, 3 Atk. 12; and in *Lord Dudley v. Lord Ward*, Amb. by Blunt 112. Lord Mansfield in *Lawton v. Salmon*, 1 H. Bl. 269, Note a. *Penton v. Robart*, 2 East. 87. *Dean v. Allalley*, 3 Esp. 11, Woodfall 320. *Elwes v. Maw* *cit.*, *Amos and Ferard*, pp. 21-2. and pp. 48-9.

³ *Poole's case*, 1 Salk. 368.

⁴ *Lawton v. Lawton*, and *Lord Dudley v. Lord Ward*, *cit.*

⁵ Noted in *Lawton v. Lawton* *ut sup.*, as ruled by Comyns, C. J.

⁶ *Ex. part. Quincy*, 1 Atk. 477. *Lawton v. Lawton*, *cit.*

⁷ *Lawton v. Salmon*, *ut sup.*

⁸ *Colegrave v. Dias Santos*, 2 B. and Cr. 76.

⁹ *Amos and Ferard*, p. 76.

Cases as to
trade fix-
tures—con-
tinued.

trade, if such buildings be let into the soil or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens.¹ But a building erected by the lessee for making varnish, and which building had a brick foundation let into the ground with a chimney belonging to it, upon which a superstructure of wood was raised, in which the lessee carried on his trade, was removable.² [296] Where a mill was built of wood, removable, but fixed to brickwork let into the ground, and was used for trade, in a question as between a mortgager and mortgagee it was found by the jury not to be a fixture. On the question of law, whether it could lawfully be taken in execution as a personal chattel, it was held that it could not. But it was laid down that the question was not to be considered as if it had occurred between lessor and lessee.³ So where certain mill-machinery together with a mill had been demised for a term to a lessee, and he, without permission of the lessor, severed the machinery from the mill, and it was afterwards taken in execution and sold, it was held that no property passed to the vendee, and that the lessor was entitled to sue for the recovery of the machinery, even during the continuance of the term.⁴ But where certain parts of a machine had been put up by the lessee during his term, and were capable of being removed without injuring either the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant, it was held that they belonged to the outgoing tenant.⁵ The question was raised, but not decided, whether limekilns, erected for the purposes of trade, were removable.⁶

Constructive
annexa-
tion of trade
fixtures.

[Spinning machines called "mules," fixed by screws, some into the wooden floor and some into lead, poured when melted into holes in the stone flooring, were held not to have become part of the freehold and to be distrainable for rent. Parke, B., said, in giving the judgment of the Court, that they were "attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of their annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels."⁷ This case, and the doctrine of constructive annexation which it appears to involve, were discussed in a later case in the Court of Common Pleas, where grinding-stones, boxed to the floor by a frame screwed into it, a steam-engine and other articles,

¹ Naylor v. Callinge, 1 Taunt. 19.

² Penton v. Robert, 2 East. 87.

³ Steward v. Lambe, 4 Moore 281.

⁴ Farrant v. Thompson, 3 Stark. N.

P. 130, 2 Dowl. and R. 1.

⁵ Davis v. Jones, 2 B. and Ald. 165.

⁶ Thresher v. East London Water-works Co. 2 B. and Cr. 608.

⁷ [Hellawell v. Eastwood, 6 Exch. 295, 20 L. J. Exch. 154. Comp. Waterfall v. Penistone, 6 E. and B. 876, 26 L. J. Q. B. 100.]

fixed by bolts and nuts to the floor, but all capable of being removed without injury to the premises or themselves, were held, in a question between a mortgagee and the assignees of the bankrupt owner, who was also occupant of the premises, that they were part of the freehold and passed to the mortgagee with it. The Court said that, assuming the last cited case to be well decided, it was no authority for holding that the articles in question were not fixtures forming part of the freehold, for, "as a matter of fact, they were all firmly annexed to the freehold for the purposes of improving the inheritance, and not for any temporary purpose."¹

Although in subsequent cases the lessee's power of removal was held to be restrained by the special covenants, yet the general doctrine was recognised as in strict observance. Thus it was laid down that, on principle, various engines and other apparatus used in mining and smelting, having been erected for the benefit of trade, might, although annexed to the freehold, have been taken away by the out-going tenant, but that he was barred by the covenants.² So it was said that salt-pans in which the brine was manufactured into salt, and pipes by which the brine was conveyed from the salt springs to the brine pits (the salt-pans being made of plates of iron supported upon brickwork, and having rings on their sides by which they were lifted off to be repaired, and the pipes being metal pipes, partly carried under ground and partly along troughs supported by tressels), would, "in the ordinary case between landlord and tenant as to the right of the latter to remove fixtures or other things erected on the premises at the end of the term," have "been removable by the tenant, as well from the nature and description of their annexation to the freehold, as upon doctrine [297] laid down by Lord Mansfield," but that they were not removable under the special covenants of the actual lease.³

A lease contained a covenant to repair and yield up in repair the furnaces, fire-engine, iron-works, dwelling-house, and all other erections, buildings, improvements, and alterations to be erected, built, or set up, except the iron-work castings, railways, wimseys, gins, machines, and the movable implements and materials used in or about the furnaces, fire-engine, iron-works, stone-pits, and premises; and there was a power given to the lessors to purchase those articles upon giving notice before the expiration of the lease. It was held that the defendants had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made

¹ [Walmesley v. Milne, 7 C. B. N. S. 115, 29 L. J. C. B. 97. See Haley v. Hammeley, 3 De G. F. and J. 587, 30 L. J. Ch. 771.]

² King v. Topping, 1 M'L. and Y. 559 and 561-2.

³ E. of Mansfield v. Blackburn, 8 Scott, 720, 736, 6 Bing. N. C. 426.

of iron, and that in such removal the defendants might disturb such brickwork as was necessary, and were not bound to restore it to a perfect state, as if the article it was intended to support or cover was still there, but that the defendants were liable for any unnecessary disturbance of the brickwork.¹ And in a question arising between landlord and tenant as to trade fixtures, the Court held that buildings of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, could not be removed by the tenant, although machinery, engines, vats, and utensils, with their accessories, might be removed.²

Art. 5.—
Urban
subjects.

The general
rule applies
to urban
subjects.

The general rule applies to urban premises, that where a lessee has annexed a personal chattel to the freehold during his term, it becomes a fixture. But from this rule there are many exceptions, and every case must depend upon its own special and peculiar circumstances, as questions of fixture are compounded of fact and law. On the one hand, it is clear that many things may be in a degree affixed, and yet during the term may be removed; and, on the other hand, it is equally clear that there may be that sort of fixing or annexation which will bar the removal, by including removal of it under waste. The leaning has been to allow the removal of things merely ornamental, but even with relation to them the nature of the annexation operates.³

Examples.

In conformity to these principles, it has been ruled, *first*, That hangings, chimney-glasses, and pier-glasses, although said to be as [298] wainscot, being fixed with nails and screws to the freehold, and that there was no wainscot under them, are matters of ornament, and do not go with the house.⁴ *Second*, Wainscot fixed only by screws, and marble chimney-pieces, may be removed;⁵ but that, it was said, was a very strong case.⁶ *Third*, So doors are removable.⁷ But *Fourth*, a conservatory erected upon a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows or doors, cannot be removed by a tenant for years, who has erected it during his tenancy, although he had a reversion in fee after the death of his lessor.⁸ *Fifth*, The lessee of a house covenanting to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, cannot remove a

¹ *Foley v. Addenbrook*, 13 M. and W. 174, 14 L. J. Ex. 169.

² *Whitehead v. Bennett*, 27 L. J. Ch. 474.

³ *Buckland v. Butterfield*, 4 Moore 440. *Steward v. Lambe*, *ut sup.*

⁴ *Beck v. Rebow*, 1 P. Will. 94.

⁵ *Lawton v. Lawton*, 3 Atk. 13. *Ex parte Quincy*, 3 Atk. 477.

⁶ *Per Lord Hardwicke*, C. in *Lawton v. Lawton*, *ut sup.*

⁷ *Day v. Austin*, Owen 70. *Cook v. Humphrey*, Moore 177.

⁸ 4 Moore 440.

verandah erected during the term, the lower part of which is fixed to the ground by means of posts.¹ *Sixth*, A pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use and convenience.²

Seventh, In a case between lessor and lessee, where the latter had removed a cornice fixed to the freehold, it was held that the question was one of fact and not of law, and that it was substantially whether the cornice was so affixed to the freehold that it could be removed without injury to the freehold.³ In the actual shape of the case the *gist* seems to have depended on technicality. But the case appears to have involved general doctrine, viz., 1st, the recognition of the right of the lessee to disannex, and 2d, the practical dependence of the exercise of that right on the capability of removal without injury. *Eighth*, An outgoing tenant may remove an ornamental chimney-piece put up by him during his tenancy, but not a chimney-piece which is not ornamental.⁴ The latter head of the doctrine is not laid down, but seems to be inferred from the words, that if the jury thought that this was an ornamental chimney-piece, the defendant had a right to remove it.

Ninth, It was ruled that a tenant had no right to remove pillars of brick built on a dairy-floor, to hold pans, although such pillars were not let into the ground, because they had become part of the freehold.⁵ *Tenth*, A lessee had erected a verandah upon the premises he used to live in, the lower part of which was attached to posts fixed in the ground. It was held that he could not remove any part of it.⁶ The *ratio*, however, of the decision in [299] this case (it has been observed) was that the building came within a particular covenant in the tenant's lease.⁷

SECTION IV.—LAW OF SCOTLAND.

In Scotland there have been comparatively few cases relative to the doctrine of fixtures, and none directly involving that doctrine as between landlord and tenant in which principle was settled. This, it has been said with apparent soundness, has proceeded from the attention naturally bestowed upon arranging contracts of temporary occupation.⁸ In consequence, caution is necessary in attempting to lay down a rule of general operation applicable to

¹ *Perry v. Brown*, 2 Stark. N. P. 403.

² *Grymes v. Boweran*, 4 Moore and Payne, 143.

³ *Avery v. Chesalyn*, 5 N. and M. 372.

⁴ *Leach v. Thomas*, 7 C. and P. 327.

⁵ *Leach v. Thomas*, *ut sup.*

⁶ *Perry v. Brown*, 2 Stark. N. P. 403.

⁷ *Amos and Ferard*, 62.

⁸ 1 Bell's Com. 753.

the rights of lessor and lessee, as those rights must now be viewed in combination with the results of the investment of capital.

Principle of accession.

Certain principles are laid down relative to acquisition by accession, but they must unquestionably be modified in practically applying them to the rights of landlord and tenant. 1st, There is the original principal that *in edificatum solo cedit solo*, or that things movable in their own nature may become immovable by annexation to the soil or building.¹

Effect of special stipulations.

But the annexation to the soil thus held to be effective *ex vi legis* may be abrogated or modified by stipulation, which is to be construed according to the fair and *bona fide* intention of the parties. A lease of ground was granted, on which it was intended that a building was to be erected. There was a stipulation that the lessee was to have liberty to pull down the building and dispose of the materials for his own behoof. The buildings were erected. During the currency of the lease the ground was acquired by another proprietor, who, on the expiration of the lease, granted a new one with the same stipulation, under condition that the lessee should give to the landlord three months' notice of his intention to pull down and remove the buildings, and if the landlord required the lessee to quit he was to give him six months' notice. The lease was terminated by the landlord giving the stipulated notice to the lessee, by whom possession was accordingly ceded. The lessee intimated his intention of pulling down the building and removing the materials. The landlord applied for interdict, on the plea that as the lessee had not given notice of his intention to remove the materials, and as he had not removed them before the expiration of his lease, the buildings and all accessories [300] accrued to him as proprietor. It was held that the contract contained no clause of forfeiture, and therefore that according to a *bona fide* construction of it, it was not intended that the materials should be forfeited to the landlord in the event of the tenant not giving notice. The landlord's notice imported that the lessee was to leave the land and take his own property with him, and if the landlord suffered damage from *mora* on the removal, his remedy was not forfeiture, but by an action for violent profits or damages, and the interdict was accordingly refused.²

Conversion by destination.

2d, The doctrine of *immobilitas* by destination has been recognised in questions between heir and executor.³

¹ 1 Craig, ix. 7; 2 Stair, i. 40; 2 Mackenzie's Inst. i. 6; 2 Bankt. i. 18; 3 Wall. vii. 161; 2 Ersk. i. 16, and ii. 4; 1 Bell's Com. 753; Bell's Pr. 1473; More's Notes, cxliii.-v.

² Laing v. Stephenson, 23 Nov. 1848, 11 D. 142, 21 Jur. 28.

³ Craig, *ut sup.*; Dirl. and Steu. 133-4; Wallace, *ut sup.*; 2 Ersk. ii. 14, and Note *; 1 Bell's Com. 752-3; 3 Stair, viii. vol. ii. p. 600, Note (by Brodie); 2 Sandf. on Herit. Succ. 213-22. Johnston v. Dobie, 1783, Mor. 5443.

3d, Manufacturing machinery and utensils, in cases between ^{Machinery.} heritable and personal creditors, have been held to be immovable.¹

And 4th, A tenant who has erected new buildings, as houses, ^{Buildings, &c., erected by tenant.} offices, or fences, is not entitled either to remove them or to have remuneration from the lessor by abatement of rent or otherwise.²

But in dealing with the removal of fixtures in a question between lessor and lessee, the rights of the latter are to be favourably considered. Thus in a petition for breach of interdict against the lessee for removal of fixtures, the character of the erections as fixtures must be very clearly proved; and it was observed that, in a question between landlord and tenant, the same things will not be held to be fixtures which will be considered as such as between heirs and executors, and that "in the former case the tenant was always to be favourably viewed."³ But 5th, It has been said that where a lessee has for his own convenience made additions to the subject of his temporary possession, upon expiration of the term of occupation the whole machinery ought to go together.⁴

In the absence of direct authority, no other doctrine can be ^{General Rule.} stated than that arising from the general principle formerly mentioned,⁵ applied practically by ascertaining by evidence in each instance (1) what is or is not annexed, so that it can or cannot be removed without any actual injury, or without impairing the established use for which the subject was leased; [and (2) what was the intention of the party or parties in making the alterations or additions, or allowing them to be made. In questions between landlord and tenant the presumption is that improvements made by the latter were for his own benefit and are removable, at least where made for the purpose of his trade or business.⁶] Nor can any distinction between [301] agricultural and commercial subjects be justly recognised, because in each the erection forms a part

¹ 1 Bell's Com. 752-4; 2 Ersk. 4, Note 20; 2 Stair, i. 40, Note c (by Brodie); Sandf. *ut sup.* Arkwright v. Billings, 3 Dec. 1810, F.C. 52. Niven v. Pitcairn, 6 March 1823, F.C. 204, 2 S. 270.

² 2 Stair, i. 40, and Note a (by Brodie); 1 Bankt. ix. 42; 2 Ersk. vi. 39, and Note 119. Hodge v. Brown, 1664, Mor. 3561, 13,400. Whites v. Houston, 1707, Mor. 1525-8. Thomson v. Oliphant, 1822, 1 S. 307.

³ *Per* Lord President—*Curia assenti.* Anderson v. Thomson, 1852, 1 St. 917. [See Syme v. Harvey, cited above, p. 319.]

⁴ 1 Bell's Com. 735.

⁵ Sec I. of this chap. p. 319.

⁶ [Syme v. Harvey, 14 Dec. 1861, 24 D. 902. The interlocutor in this case, which related to the greenhouses, &c., in a nursery, finds that "having regard to the tenure and occupation of the said garden, the trade purposes for which it was used, and for which the said structures were erected by the copartners (the tenants) the nature of the structures themselves, and the amount of capital expended thereon, and also having regard to the demand" of the landlord "to have the garden restored to its original condition," the tenants were entitled to remove these structures, &c.]

of the capital of the lessee, expended in order to ensure the enjoyment of the subject taken by him for the realisation of profits by means of his capital.

The same order shall be observed in detailing the Scotch cases as was observed in detailing the English.

Art. 2.—
Agricultural subjects.

Lessee erecting fences for his own purposes bound to remove or put them in proper repair.

1st, It was decided that a lessee who had voluntarily erected certain subdivision fences upon his farm must either clear them away or put them in a state of repair. There was some difference of opinion on the Bench whether the lessee was foreclosed of his right to remove the fences in consequence of his not having done it before his removal from the farm; but the Court was nearly unanimous in thinking that he had the option either of removing them or of repairing them as he thought best, if the landlord had no objection to their remaining.¹ The lessee's power of removal was therefore recognised, and fences, said by one party to be walls, and by the other earthen dykes with hedges, were deemed removable.

Tenant voluntarily erecting houses on farm.

[It was stated in previous editions that this case had been overruled by a subsequent one, in which it was held that a tenant was not entitled to remove or bound to repair houses voluntarily erected on his farm, but that the landlord was entitled to claim them without offering any indemnification to the tenant.² But that case referred to buildings, and not to fences voluntarily erected by the tenant. It appears from the report in the second edition of Shaw's Reports that this distinction was made; and the opinions show that instead of overruling the case of *Andrew v. Morrison*, it was confirmed.]

Wire fences.

In a subsequent case³ the rule was laid down that wire fences erected by the tenant for his own benefit and not for the permanent improvement of the farm—in this case wire fences put up for the more convenient occupation and management of a sheep-farm, and not in substitution for former decayed fences—might be removed by the tenant at leaving the farm. The Lord Justice-Clerk (Moncreiff) and Lord Cowan laid some weight on the temporary character of these fences, referring to the principles explained in *Syme v. Harvey*; but that observation may perhaps be taken not as applying to the general law, but rather to certain stipulations in the lease founded on by the landlord as to the erection of sub-division

¹ *Andrew v. Morrison*, 19 Jan. 1818, F.C. No. 40, p. 162.

² Bell's Pr. 1254; More's Notes cccli. *Oliphant v. Thomson*, 8 Feb. 1822, F.C. No. 155, p. 542, 1 S. 307.

³ [D. Buccleuch v. Tod's Trs. 18 July 1871, 9 Macph. 1014. See *Graham v. Lamont*, 18 Feb. 1875, 2 Rettie 438, as to wire-fencing in a question between a seller and purchaser.]

fences, which it was held meant permanent stone fences. It must, however, still be said that the character of the fence, the nature of its connection with the soil, and its position in the farm, as well as the conditions of the lease, may in such cases have a material effect on the tenant's right to remove it.]

But 2*d*, A tenant who at his own cost makes additions to the houses on his farm, is not entitled to dilapidate them or carry off the materials at his removal.¹ This was considered by the Court to be a settled point of law. But its introduction into the actual case must be deemed to have been *obiter*; for the subject was a beetling-mill, used by the tenant as a bleacher, which was nowise subservient to the husbandry of the farm. A rule, therefore, applicable to an agricultural subject was foreign to the subject.

But the general maxim was subsequently held to be law; for, 3*d*, A lessee having erected houses upon his farm, insisted at the end of his lease "that he had the option either to remove them or to put them into repair, and he proposed to carry them off." This was resisted by the landlord, and in an action before an inferior court the tenant was ordained to leave them in good repair. But the Court of Session decided that, while the tenant was not bound to put the houses in repair, he was not entitled to [302] remove them.²

4*th*, In a question between heir and executor, the Lord Ordinary found that the executor had a claim against the heir for the value of a thrashing-mill, which, in a question some time before decided by the Court, was found to be a subject partly heritable partly movable, the built part being deemed to be heritable and the machinery movable, which last was to belong to the executors.³ But it is to be observed that the case referred to in the interlocutor has not been traced, notwithstanding a search for it in a subsequent case;⁴ and the report shows that the interlocutor, in so far as it related to the thrashing-mill, was acquiesced in by the heir, so that the point was not reviewed by the Court. Notwithstanding, the decision, whether sound or not as between heir and executor, seems to be sound as between lessor and lessee; for it is conformable to principle that the built part should be fixture and the machinery movable.⁵

¹ Murray v. Bisset, 1805, Hume 818.

² Thomson v. Oliphant, 8 Feb. 1822, *sup.*

³ Hyalop v. Hyalop, 18 Jan. 1811, F.C. 143, More's Notes, cxlv.

⁴ So stated in *Sess. Pa. in Arkwright v. Billinge*, 3 Dec. 1819.

⁵ In Dixon v. Fisher, 6 March 1843, Lord Moncreiff, speaking of the machinery in Hyalop v. Hyalop, said, "Surely it would be movable between landlord and tenant."

Campbell v.
Howden.

Thrashing
mill.

But subsequently, where a lessee, who was bound by the lease, in consequence of a sum of money paid to him by the lessor to build a farm-steading, thrashing-mill, and offices, had fitted up the thrashing-mill with machinery, it was held that the machinery belonged to the lessor.¹ On the bench there was a difference of opinion, for it was laid down by Lords Alloway and Pitmilley that in construing the contract it was necessary to take into view the general understanding of the country, which was that the lessee supplies and takes away with him the machinery of a thrashing-mill; that the lessor was not bound to supply the machinery, which therefore the lessee is entitled to remove; and consequently that the term "build" used in the lease applied only to the building for holding the machinery, and not to the machinery itself. But on the other hand, it was held by the majority that the question, being one of the construction of a contract, it was unnecessary to consider the general understanding of the country as to the machinery of thrashing-mills, which can only have effect where the lessee has provided it of his own accord; and that the lease inferred an obligation to erect a complete thrashing-mill, and not merely the bare walls of a building to contain the machine. Whatever opinion may be formed of the soundness of the construction of the contract, the decision appears to leave unquestioned the doctrine that the machinery of a thrashing-mill is removable by the lessee if voluntarily supplied by him.

Racks, &c.,
in stable.

[303] 5th, Where a lessee had put up trevisses, racks, and managers in a cottage not in general used as a stable, but temporarily fitted up by him as such, and which had been taken away by him at his removal, agreeably to a common practice in the neighbourhood, it was held, under a clause obliging him to leave the premises in good tenantable condition, that he was entitled to remove the erections, and that he was not to pay damages on account of removing them. But "the Court thought that if the trevisses, &c., had been permanent fixtures, the case might have been different."² As nothing particular in the mode of annexation appears, this decision and opinion combined seem to involve the doctrine, that if the erections had been made within a stable, for the completion of which, as such, they were requisite, they would have been fixtures; but that having been erected within a building of which in its own nature they did not form a necessary part, they were removable. The fact that they had been erected for a temporary purpose merely could not affect the question, because, if

¹ Campbell v. Howden, 22 Feb. 1825, 3 S. 569.

² Scott v. Ewart's Repra. 1824, 3 S. 245.

annexed for however short a period, they would become fixtures, if such, when annexed, was their character. Nor does the local usage seem to have weighed; for, as may be inferred from the opinion, it would have been disregarded had the erections been in themselves deemed fixtures.

On this topic there is no decision directly in point, but there are analogical cases. *1st*, In a question between heir and executor the Lord Ordinary repelled the claim of the heir to the plants in the nursery garden of the estate; but the Court inclined to distinguish between the case of a nursery garden kept for sale, whereof the produce is movable, as destined to be disposed of in the market, and in the case of a nursery garden intended for the service of an estate of lands of which it is a part. Though naturally movable, the plants in such a nursery (it was deemed), like the sashes and window-frames intended to be put up in a new house, are heritable *destinatione*, and they are besides of more value to the heir of that estate than to any other person.¹ The necessary inference from the opinion is, that the plants in a nursery garden, kept for sale, would have been movable as between heir and executor, and therefore, *a fortiori*, they would be removable as between lessor and lessee. [A similar distinction was made, in the opinions in a late case, between trees and shrubs planted by the tenant of a mansion house and those planted by the tenant of a nursery for the purposes of his trade, the latter being removable, the former not.²] *2d*, Lands let as a nursery garden were sold under an heritable bond; and in a competition between the original landlord and the purchasers, the question was raised whether the shrubs, [304] plants, and similar produce went with the lands as *pars soli*, or whether they were movable and liable to hypothec. The determination of this question was not necessary for the decision of the cause; but if it had, the Court said they would have felt much difficulty in deciding.³ A doubt, indeed, was expressed [by Lord Corehouse] "whether subjects of that nature can be viewed as proper *invecta et illata* or are liable to hypothec." Notwithstanding the high authority from which the doubt proceeded, its efficacy must be deemed questionable if it was founded on the doctrine that the plants and shrubs were to be held as *pars soli*, and therefore as accruing to a singular successor to the defeasance of the right of the lessee, and of the consequent right of the lessor under his

Art. 3.—
Horti-
cultural
subjects.

¹ Bell's Pr. 1475. *Gordon v. Gordon*, 1860, Hume, 188.

² *Begbie v. Boyd*, 15 Dec. 1837, 16 S. 232, 236.

³ [*Syme v. Harvey*, 14 Dec. 1861, 24 D. 202.]

hypothec; for, on principle, the lessee would have been entitled to remove them as forming the stock or subject-matter of his trade.

Glass frames
and green-
house
apparatus.

[While the question had never occurred when the author wrote, it has since been held that the glass-frames and heating apparatus of greenhouses and hothouses erected for trade purposes by a lessee of a garden used as a nursery, are removable, while the question as to the brick or stone erections connected with these was, in the special circumstances of the case, not determined.¹]

Art. 4.—
Commercial
Subjects,
including
manufactur-
ing and
mineral.

There has not on this subject been any decision, the *gist* of which consists of what is or is not deemed a fixture as between lessor and lessee. But there are decisions in which the matter incidentally arose, or in which it is involved by close analogy. These relate to questions of succession, to the respective claims of creditors, to those of copartners, and to claims for compensation for meliorations.

Machinery
of coal mine.

1st, It has been held that as the heir has a right to a going coal, so the buckets, chains, and all other accessory instruments, will belong to him, and not to the executor,² but as between lessor and lessee these instruments would certainly be removable.

Saltpan.

2d, By a very old decision it was held that the bucket or wand of a salt-pan cannot be poulded if there be other pouldable goods.³ There appears to be no reason to doubt that, in a question between lessor and lessee, these utensils would, as implements of trade, be removable by the lessee. 3d, A brewer's copper caldron was held to be pouldable; for it having been objected against the formality of poulding an implement of that kind, that it was not carried to the market-cross and appreciated there, though a symbol and part of it was so carried, viz., a [805] piece of its ledges, the poulding was found lawful.⁴ Such an implement would therefore be removable by a lessee.

Machinery
of cotton
mill: Ark-
wright v.
Billinge.

4th, The machinery of a cotton-mill was held to be included in an heritable security over the mill.⁵ The soundness of this decision has been doubted;⁶ and in a subsequent case it was said that the Court did not proceed upon the ground that the machinery which formed the subject of competition was heritable, and that they had actually recalled the interlocutor of the Lord Ordinary finding it to be so, but that, holding it to be movable, they had

[¹ *Syme v. Harvey*, 14 Dec. 1861, 24 D. 303.]

² *Dirl. and Steu.* 133-4.

³ *Sibbald v. Lord Sinclair*, Jan. 1555, Mor. 10,504.

⁴ *Smeton and Hepburn v. Brand*, 1698, Mor. 10,524.

⁵ *Arkwright v. Billinge*, 3 Dec. 1819, F.C. 52.

⁶ 1 *Bell's Com.* 755; 2 *Ersk. ii.* 4, Note 20; 2 *Stair, i.* 40, Note b (by Brodie); *Sandf. on Herit. Suc.* 220 and 222.

preferred the heritable creditor, because, conformably to the plain understanding of parties, the terms of the disposition, together with the possession which he had been allowed to obtain, had vested him with the real right.¹ But the Lord Justice-Clerk (Boyle), who (according to the report) thought at the time of giving judgment that it was necessary to decide the abstract question, whether the machinery was comprehended under the heritable security, took a middle view; for he was of opinion that the permanent fixtures were heritable, as the mill or building itself, and the steam-engine which was built into it; but that the rooving apparatus, the mule jennies, and the like, as they were often hired and might be pointed, were in no other situation than common furniture.

Throughout the argument it appeared to be considered that as between lessor and lessee the machinery would have been removable. In so far as regards the smaller machinery, there can be no doubt that it would. A cotton-mill is often taken without any of that machinery, and often with a part only, and the lessee brings with him what he requires, being sometimes his own and sometimes hired. In consequence he is entitled to remove it, and in practice uniformly does so. Upon principle and the analogy of the law of England (which in commercial questions must be held to be authoritative), the same rule would apply to the steam-engine and the other large machinery. Although sunk into the ground or built into the wall, such implements are erected, not for the purpose of enjoying the produce of the land, or of creating a permanent accommodation within the building in which they are placed, but of executing manufacturing operations which are really independent of both, and which with the same implements can be equally well conducted in another place, to which consequently these implements may be removed by their owner.²

5th, In a subsequent case it was decided that large vessels used in a manufactory, although not fixed either to the ground or the building, were covered [306] by an heritable security, it being necessary before removing them to take them to pieces, after which they were of use only as materials.³ Had this been a question between lessor and lessee, the vessels would have been removable, for whether whole or taken to pieces, they would have been the instruments of the lessee's trade or the materials of those instruments. [In a recent case, in a question between the heir and executor of a person who was both owner and occupier of a factory, it was held that spinning-machines, having no special adaptation

Niven v. Pitcairn.

Dowall v. Milne.

¹ *Niven v. Pitcairn*, 6 March 1823, F.C. 204, 2 S. 270.

² 1 Bell's Com. 753.

³ *Niven v. Pitcairn*, *ut sup.*

to the building, and being attached to it only for their more convenient use, were movable. In this case the general principles decided by previous cases between heir and executor were stated by the Lord Justice-Clerk (Moncreiff), who added that the well-established principle that trade fixtures do not become heritable by accession in questions between landlord and tenant, "are not exceptions to the general rule proceeding on favour to trade." On the contrary, they rest on the principle that "in such cases the manifest intention with which the articles were placed in their relation to the real estate was not the advantage or benefit of the owner of the property or of the property itself, but solely the convenience of the tenant's trade."]¹ 6th, In an action of count and reckoning arising out of the dissolution of a copartnery of cotton-spinners, the Court in one of its interlocutors found that the bell of a spinning manufactory was a fixture.² On grounds already stated, a different judgment would probably have been given between landlord and tenant, the bell for summoning the workmen being unquestionably an implement of trade.

Factory
bell.

Question—
What is
movable
machinery?

7th, Parties obtained a lease of a waulk-mill for twenty years from the magistrates of a burgh, stipulating that they were to receive the value of their meliorations at the end of the twenty years, or to obtain a new lease. They continued to possess for more than twenty years in addition to the twenty years stipulated, but without getting an express renewal. Afterwards they obtained a charter from the magistrates of two-thirds of the subjects, and erected works and machinery upon the whole. That charter was subsequently set aside in an action of reduction, because the authority of an act of council had not been obtained. It was held, with reference to a claim made for meliorations in that action, that the parties could not claim the value of these meliorations on the third to which they had obtained no charter, nor of erections made prior to the charter, nor of movable machinery; but it was decided they had a claim for all fixtures and permanent erections which improved the property resumed, made after the date of the charter and prior to the decree of reduction, and a remit was made to the Jury Court in order that the sum due for meliorations might be ascertained.³ By this decision, consequently, the movable machinery was held to be the property of the lessee or feuar, and therefore removable by him, while what ought to be comprised under that description was held to be matter for a jury.

¹ [Dowall v. Milne, 11 July 1874, 1 Rettle 1180.]

² Barr v. Macilwham and Spiers, 1831, 1 S. 124.

³ Mags. of Selkirk v. Clapperton, 13 Nov. 1830, 9 S. 2, 3 D. and A. 278.

8th, While cotton, woollen, iron, and those other manufactories ^{Corn mill.} which are the growth of commercial industry, would be held to be classed under the principle which denies that machinery put up by a lessee becomes a fixture, some doubts might perhaps be raised with regard to an ordinary corn-mill, as by the law of Scotland it is deemed a separate feudal subject, having for infeftment its separate and appropriate symbols.¹ [307] In arguing the right of personal creditors over the machinery of a cotton manufactory, it appears to have been conceded that a different rule might be applied to a corn-mill, as the wheel could not be removed without injury to the building, and usage had fixed the other parts to be heritable.² But assuming that such a rule would apply in a competition between creditors, it does not follow that it should be applied as between landlord and tenant. In modern times corn-mills are leased to copartneries, which are as much trading companies as are those for manufacturing cotton or iron. It is no more difficult to remove the wheel of such a mill than many parts of the larger apparatus of other manufactories which are removable. Nor, in so far as relates to lessor or lessee, is there any usage which can take the case out of the favourable construction common to manufacturing subjects.

9th, In one instance the removal of brick buildings was allowed. ^{Removal of brick buildings allowed.} A piece of ground was let along with a theatre, with liberty to the lessee to make alterations upon certain wooden buildings erected upon it. These were converted into brick buildings, which the lessee, upon the expiration of the lease, was held to be entitled to remove. But the case cannot be accounted a precedent, because the contract, being deemed a bargain for the temporary use of a piece of waste ground intended for building, and not a lease, the contract, it was held, was not to be governed by the ordinary rules applicable to regular leases.³ 10th, One of the two partners of a ^{Cox v. Stead.} company let to the company a mill with the large machinery fixed therein, and assigned the small machinery to the company, the value of which was placed to his credit in their books. He thereafter died in debt to the company. The mill with its appurtenances was sold, and the full rent stipulated in the lease for the buildings and machinery was paid by the surviving partner, who by the lease was allowed to continue lessee and take the small machinery. This partner became bankrupt. It was held that the

¹ 2 Craig, iii. 24, 27; vii. 6, and viii. 5. 2 Stair, iii. 71; vii. 15; and 2 Stair, iii. 39; vol. i. p. 247, Note c (by Brodie). 3 Bankt. iii. 94; and vii. 48. 2 Ersk. iii. 36.

² Arkwright v. Billinge, *ut sup.*, F.C. 55.

³ Thomson v. Harvie, 1827, 5 S. 227. [See opinions in Syme v. Harvey, 14 Dec. 1861, 24 D. 202.]

trustee on his sequestered estate was not entitled to appropriate the large machinery as company estate, and to obtain repetition of the rent paid since the death of the other partner in so far as might effeir to that machinery.¹ There was a full argument in this case whether the steam-engine and great gearing were to be held as things *fundo annexa*. But it may be doubted whether general doctrine was decided, or even involved; for the case depended on the real intention of the parties under a specific contract. It was a question whether the machinery had passed at all to the surviving partner; but it was *per expressum* a part of the subject [308] let by the lease, from the rent stipulated in which it was sought to be deducted.²

Dixon v.
Fisher.

A case has been recently decided to which particular attention is due, by reason of its being the first in which the law of Scotland applicable to the doctrine of fixtures has been thoroughly considered on general principle. The questions immediately at issue were between heir and executor; but there is important matter of law which by direct analogy applies to lessor and lessee, and which, on principle, may be deemed conclusive between such parties. Numerous questions arose; but there is only one with which it is necessary to deal. A remit was made to an engineer of great experience, and one of the queries was, What is the practice, as between landlord and tenant of coal-fields, collieries, or iron-works, with regard to the removal of steam-engines and machinery at the end of a lease, when such engines are of the description that belonged to the deceased? How far is the landlord in practice held entitled to retain, or the tenant to remove, such engines, implements, and machinery where no positive agreement has been made on the subject? The answer was, "The general practice at coal and iron-works similar to those of the deceased is for the tenant, in the event of the termination of his lease, to remove the whole of such engines and machinery if not previously belonging to the landlord, or specially acquired to him by the terms of the lease. And in the event of the exhaustion of the mineral-field, or any permanent bar arising to the profitable working of the minerals, the whole of the engines and machinery are removed by the tenant or worker of the field, or by the proprietor if his property, and the general premises dismantled, as it may be profitable to do so."

Amidst much contrariety of opinion on other points, it was

¹ Cox v. Stead, 1 June 1833, 11 S. 672; aff. 1834, 7 W. and S. 497.

² This view of the purport of the

decision was given by Lord Moncreiff in Dixon v. Fisher, 6 March 1843, and it may well be deemed to be sound.

held that there could be no doubt that the machinery erected by the deceased as a tenant was his property; and that, according to all the authorities, he had a right to remove it as personal property; and that this is the very point conceded on all hands, that in a question between landlord and tenant such property is personal estate and belongs to the tenant. The judgment, conformably to the opinion of the whole Court, was that the erections made on subjects under leases by the deceased, which have been removed by the representatives at the termination of those leases were movable, and subject to the claim of *legitim*.¹ This case must be held to have recognised as the law of Scotland the doctrine that the lessee of a mineral subject, and consequently of any manufacturing [309] or other commercial subject, is entitled to remove the machinery or apparatus erected by him.²

[The principal subjects in dispute in this case were fixtures placed by Mr Dixon for mining purposes on lands which were his own property. But it also raised a question as to tenant's trade-fixtures (the 7th class dealt with in the report) erected by him on subjects of which he was only tenant. It was held that these were movable in a question between heir and executor, and in *Syme v. Harvey*, Lord Ivory says that in this branch of the case "effect was given to the interest of the tenant, and a distinction drawn between the principle which was to regulate it and those which were to regulate the case generally." This case has been held an authority on the point of tenant's trade fixtures, and the rule is recognised that in leases of ordinary duration, where a tenant erects fixtures solely for the purposes of his trade, these remain his property, and cannot be claimed by the landlord as *partes soli*.]³

A steam-engine and stalk were held, according to the usage of ^{Stalk of} trade, to be accessories of the "cutting-shop" of a glass-work. ^{glass-work.} The case did not relate to the law of fixtures, but affords an analogy. If the tenant himself had erected the stalk, would he have been

¹ *Dixon v. Fisher*, 6 March 1843, 5 D. 775-90, 820, and 840; 15 Jur. 394, *et seq.* Aff. 26 June 1845, 4 Bell's App. 286.

² The author will here make some observations which could not properly be introduced into the text. *1st*, No weight can attach to the decision in the case of *Murray v. Bisset*, that a tenant was not entitled to carry off the materials of a beetling-mill erected by him as a bleacher; for the Court dealt with that case on a maxim applicable to the tenant of an agricultural subject. *2d*, It was said by Lord Moncreiff in *Dixon*

v. Fisher, that the case of *Niven v. Pitcairn* scarcely related to machinery at all, and was, besides, involved in other important specialties. And *3d*, in the case of *Girdwood & Co. v. Wilson*, 13 May 1834, 12 S. 576, relative to a claim of hypothec, the doctrine seems to have been assumed that the machinery of a cotton-mill belongs to the tenant; but the case apparently applied to the small machinery only.

³ [*Brand's Trs. v. Brand's Trs.* 19 Dec. 1874, 2 Rettie 258. *Syme v. Harvey*, 14 Dec. 1861, 24 D. 202. See *Graham v. Lamont*, 18 Feb. 1875, 2 Rettie 438.]

entitled to remove it? On principle he apparently would, but there is no decision which can be deemed to go so far.¹

Art. 5.—
Urban
subjects.

The doctrine that movables in a house let with the house cannot be sold by the tenant, for the proprietor may evict them *à quocunque possessore*, was early laid down;² but no decision has been discovered relative to the doctrine of fixtures as specially applicable to urban subjects in which general doctrine has been laid down. In a comparatively recent case, a landlord was held to be precluded *personali exceptione* from claiming an article as a fixture in a dwelling-house let by him, which otherwise it appears to have been assumed that he might have claimed. A banking company, in order to obtain accommodation for their business, took a lease of a house, of which one of their own provincial agents was the proprietor, and in which the business of the agency was transacted. On their entry the company fitted up the premises as a bank-office, and built into the wall a stone safe, having an iron door and lock fixed or built into the wall. In two different statements transmitted to the company the lessor included the safe as a part of the property of the company. The banking company having proceeded to remove the iron door and other parts of the safe, the landlord claimed them as fixtures; but it was held that by his own acts he had barred himself from so doing.³ Independently of the plea of personal exception, it may be doubted whether the removal could have been barred; and the soundness of the assumption that the safe was a fixture appears to be questionable. If the case be dealt with as it [310] might be, as one between the lessor and lessee of a commercial subject, the lessee would have been entitled to remove the safe as an implement of trade. If the case be dealt with as coming under the class of urban subjects among which, as reported, it has been classed, there may be difficulty; but there is reason to deem that such an implement erected by the lessee with the consent of the lessor, and severable without injury to the premises, may be removed by the lessee, on the principle that the transaction implied that there was a right to disannex.

Bankers'
safe.

General
maxims.

The scantiness of authority has probably been occasioned by acquiescence in local usage, combined with the comparatively small value of the articles. These causes involve matters so various as necessarily to preclude details, and to confine what can be stated to the mention of a few general maxims. *First*, The nature of the

¹ *Watson v. Kildston & Co.* 11 July 1839, 1 D. 1254, 11 Jur. 611.

² *Wright v. Butchart*, 1663. Mor. 9112.

³ *Waldie v. Commercial Bank*, 14 July 1842, 14 Jur. 583.

article annexed must be considered. If it be merely ornamental, it will more readily be deemed removable. ^{Ornamental articles.} Mirrors, pictures, cornices, hangings, and similar articles are removable although annexed to the building, and marble chimney-pieces would likely be so considered. But if the article be not merely ornamental, but of great utility, and such as is ordinarily deemed requisite for the rendering the premises entire (*ad integrandam domum*), the fact whether it be or be not a fixture will depend partly upon the mode in which it is annexed and partly upon local usage. For *second*, ^{Mode of annexation.} the mode of annexation is very material; and as it varies with the increase of mechanical skill, many articles formerly deemed fixtures have now ceased to be so, and many now considered as such may hereafter be thought removable. Where screws are used, the prevalent opinion of practical men is, that the article is removable; but if carried to its full extent this opinion might include much of the work in wood or metal, as this mode of annexation is now very common. *Third*, Local usage has a strong effect by creating a ^{Usage.} rule, equitable because from its notoriety known to the contracting parties, and extremely convenient, because it renders minute specification unnecessary. In consequence of usage, the plants and shrubs in the parterres of villas are in some places considered as removable.

SECTION V.—EFFECT OF SPECIAL STIPULATIONS ON THE LESSEE'S RIGHT TO REMOVE FIXTURES.

Where there is a special stipulation in the lease relative to fixtures, or one of such a nature as to affect them, the right of the lessee must necessarily be governed by it. In England different cases have arisen in which the legal effect of such stipulations to [911] debar the lessee's right of removal was examined and decided. Each case of course depended on the particular *species facti*, and therefore in giving judgment the Court carefully noted that the case could not be drawn into a precedent derogating from the right vested by the common rule of law. In cases already cited, the Courts held that by the special covenant the lessee's right of removal was barred.¹

As formerly indicated, the rarity in the Scotch Courts of decisions relative to fixtures as between lessor and lessee has been deemed to proceed from the stipulations having been so specific as to preclude question. But cases have arisen in which the right of

¹ King v. Topping, *Earl of Mansfield v. Blackburne, et al.* sec. iii. p. 307, *ut sup.*

the party claiming the power of removal has been tried and determined on the terms of the contract.¹ An examination of the tenor of such cases would be superfluous, as the decisions cannot establish general doctrine.

SECTION VI.—OF THE TIME WITHIN WHICH THE LESSEE MAY REMOVE FIXTURES.

A question may arise as to the time within which a lessee is entitled to remove fixtures. He is undoubtedly entitled so to do at any time during the currency, and down to the day when he leaves the premises. The *gist* of the question therefore will be whether he is entitled to remove them after his occupation has ceased, and if so, within what time?

English
rule

In England the rule applicable to a lessee for a term of years is that he is bound to remove them before the expiration of the term, on the principle that knowing the precise time when his possession ceases, it is incumbent on him to exercise vigilance in removing his fixtures. If he do not remove them during his original term, or during such farther period of possession by him as warrants him to occupy the premises under a right as tenant, he is held *presumptio juris et de jure* to have meant to leave the unsevered property for the benefit of the landlord.² The same rule applies to cases where the tenant by any act of his own has (by forfeiture by condition broken) put an end to the term, as when it expires by effluxion of time.³

Although there has been no decision, yet it has been said, with [312] apparent soundness, that tenancies which are of uncertain nature and duration, as for life or at will, are excepted out of the general rule; and that the tenants should be allowed to remove their fixtures within a reasonable time after the expiration of their right of occupancy, as they cannot be subjected to the imputation of neglect, nor be presumed to have intended a gift to the landlord.⁴

Scottish law.

No authority has been discovered either in the Books or deci-

¹ Cox v. Stead, *ut sup.*, and *vide* opinions of the Judges in Dixon v. Fisher, *ut sup.* [Dunn's Trs. v. E. of Zetland, 18 March, 1862, 24 D. 801.]

² Amos and Ferard, p. 94, *et seq.* Poole's Case, Salk. 386. Quincy, 3 Atk. 477. Lee v. Risdon, 7 Taunt. 191. Elwes v. Maw, 3 East. 50. Davis v. Jones, 2 B. and Ald. 167. Buckland v. Butterfield, 4 Moore 440, and Weston

v. Woodcock, 7 M. and W. 14. [Pugh v. Arton, L. R. 8 Eq. 626. Roffey v. Henderson, 17 Q. B. 574. Heap v. Barton, 12 C. B. 274, 21 L. J. C. P. 153. Sumner v. Bromilow, 34 L. J. Ex. 130.]

³ Minahull v. Lloyd, 2 M. and W. 450. Storer v. Hunter, 3 B. and Cr. 368; Amos and Ferard, pp. 103-4.

⁴ Amos and Ferard, 106.

sions from which the law of Scotland can be ascertained. In one case the question was discussed whether the tenant was foreclosed of his right to remove fences in consequence of his not having done it before his removal from the farm. But the question was not determined, as independently of it there were deemed to be grounds for decision.¹ But, on principle, there seems to be reason to think that the doctrine may probably be comprised under the following rules:—*First*, Where the lease is of specific duration, the lessee is bound to remove the fixtures before the expiration, and if there be tacit relocation, before the cessation of possession. The question has been mooted in England, but not decided, whether the lessee can save his right by a protest that he will take away the fixtures at a future time.² In Scotland it may be deemed that such a protest would be effectual if the removal was made within such a time as precluded *mora*. Even without such a protest, a reasonable time for removal might be allowed, as the presumption of a gift to the landlord is not viewed with favour. *Second*, Whatever right of removal was vested in the original tenant devolves to his heirs or assignee, subject to such conditions as affected himself; and *Third*, The representative of a liferent lessee must be allowed a reasonable time within which after the lessee's death the removal may be effected.

CHAPTER XIII.

STEELBOW GOODS.

SECTION I.—ORIGIN AND LEGAL NATURE OF STEELBOW GOODS.

Steelbow goods consist of a certain quantity of corn, straw, or *Definition.* manure, or of a certain number of horses, cattle, sheep, or other live-stock, or of certain utensils of tillage delivered by the landlord to the tenant at the entry of the latter to the farm upon condition [313] that upon the expiration of the lease the tenant shall redeliver to the landlord the same quantity or number of the same

¹ Andrew v. Morrison, 19 Jan. 1811, F.C. 152.

² Amos and Ferard, 105.

kind and quality.¹ Wherever therefore it is stipulated that steelbow goods shall be delivered (under whatever legal category they ought to be classed), the goods themselves constitute a part of the subject-matter granted by the lessor to the lessee, the farm being constituted *fundus instructus*.² In consequence the lessee cannot be compelled to deliver the steelbow goods until the expiration of the lease.³

Whether
steelbow is
now prac-
tically
known.

The origin and history of steelbow having been mentioned in the Introduction,⁴ the subject is not resumed. But it will be proper to inquire how far steelbow is at present practically known. Erskine, in stating that "till towards the beginning of this (the eighteenth) century," landlords delivered steelbow goods to the tenants, appears to indicate an opinion that after that period the practice had ceased. But it unquestionably continued in full operation in some parts of Scotland until after the middle of the eighteenth century. A reported case proves, *first*, that a contract of lease with steelbow corn, cattle, and implements was entered into in the year 1758; and *second*, (as established by evidence), that subsequently to 1762 the practice of letting lands with steelbow stocking was known and practised in some districts of the Highlands.⁵ With the exceptions to be immediately stated, steelbow has fallen almost into disuse.

Recent
examples.

For the purpose of ascertaining whether steelbow in its full extent was still practically known, the reports of the Board of Agriculture upon several of the Highland and northern counties were examined. For in those districts, if at all, it would likely have existed, but no indication of it was discovered. But lately the existence of two examples of it has been ascertained. One of them⁶ is in a north-western district of the Highlands, and the other⁷ is in the Hebrides. The lease in the former case shall be analysed:—*First*, The lands, which are extensive, are let together with the whole stock of sheep upon them, of a specified number and of a certain value, conformably to a report appended. [314] *Second*, A

¹ Craig, ix. 7; 1 Stair, xi. 4, and 2 Stair, iii. 81; 1 Bankt. xii. 2, and 2 Bankt. iii. 173; 2 Ersk. vi. 12, and 3 Ersk. i. 18.

² Craig, *ut sup.*; Dirl. and Steu. 386-7; 1 Bankt. xii. 4. Boyd v. Russell, 1809, Mor. 5388, 14,777. Lawson v. L. Boggall's Tenants, 1828, Mor. 14,777-8. V. of Belhaven v. Lady Luss, 1837, Mor. 14,478. Dundas v. Brown, 28 Jan. 1842.

³ 1 Bankt. xii. 3; 1 Ersk. vi. 12.

Lawson v. L. Boggall's Tens. and V. of Belhaven, &c., *ut sup.*

⁴ *Supra*, Intro. chap. viii. p.

⁵ Butter, &c. v. M'Vicar, 1764, Mor. 6206.

⁶ App. No. xx., where the stipulations of the lease are inserted in so far as they are applicable to steelbow.

⁷ The Author has not seen the other lease (which is dated in 1850), but he has ascertained its existence and general purport from a competent judge, by whom it was seen and examined.

reference is made to that report, and to a list or inventory of the stock leased, which is subscribed by the parties as the stock delivered to the lessee; but it is declared that, notwithstanding the valuation and delivery the sheep stock is, and shall remain during the currency, the property of the lessor, and shall not be liable for his debts or attachable by his creditors, but shall be redelivered to the lessor by the lessee and his heirs. *Third*, The duration is for nineteen years. *Fourth*, The lessee is to pay a certain rent for the land, and a certain further rent, being equal to interest at the rate of five per cent. annually on the value of the sheep stock, in name "of steelbow rent or duty for the same," under the same stipulations as apply to the rent for the land. *Fifth*, The stock of sheep delivered to the lessee at a valuation with reference to the prices at certain markets, shall at the expiration of the lease be valued by persons to be mutually chosen, with power to the valutors to appoint an overman, and stipulating that the valuation shall be made with reference to the prices at the markets specified for the year of the lessee's outgoing. And *Sixth*, In the event of there being an increase in the valuation of the stock delivered, the lessor shall pay the surplus to the lessee; but if there be a diminution in value, the sum deficient shall be paid by the lessee to the lessor. The lease contains a clause of warrandice and the other clauses usual in leases of pasture lands.¹

Steelbow is still prevalent, and advantageously so, with relation to manure, and to straw, fodder, and the other materials of which manure is made.

Steelbow
manure,
straw, &c.

There is difficulty in determining whether steelbow should be included under the contract of Mutuum or that of Location. But it is of importance that its legal nature should be ascertained, as results differently affecting the interests of lessors and lessees will arise, according as it shall be classed under the one or the other of those contracts. If it be classed under mutuum, the goods will be the property of the tenant, and consequently upon his bankruptcy will be taken by his general creditors; but if it be classed under location, the result will be, that as an integral portion of the subject leased the landlord will have a preference. Each view is supported by authorities of weight. On the one side, it is expressly laid down by Stair and Bankton that steelbow falls under mutuum.² And by Erskine and Bell it is described as being "a species of

Legal nature
of steelbow
contracts.

¹ This lease is dated in the year 1848. The Author has been given to understand that examples of steelbow leases may still probably be found in the south-western district of Scotland, but

he has not been able to ascertain their actual existence.

² 1 Stair, xi. 4; 1 Bankt. xii. 1 and 2.

mutuum."¹ In consequence, it was held that the property of the [315] goods was transferred to the tenant, and that the landlord had merely a personal right or right of action against the tenant for recovery at the expiration of the lease.² By the older cases it was decided that where there was a written lease the steelbow goods became the tenant's property, and that an action of spuilzie concerning them was competent to him only for whose debts they were poindable.³ On the other side, by the orders to be observed by all commissaries "in confirmation of all testaments," it is directed that "steelbow goods and cornes to the master" shall be the subject of a privilege, and therefore shall be deducted along with other privileged debts in confirming the tenant's testament before the *quot* is struck.⁴

Landlord preferred to tenant's creditors in competition for steelbow goods.

Although it has been doubted how far this rule is conformable to principle,⁵ not only does there not appear to be any obstant decision, but the principle of the landlord's privilege has been extended farther. For a tenant having died bankrupt, and a competition for the steelbow goods having arisen between the landlord and the general creditors, the former was preferred. The report does not state upon what reasons the judgment was founded. But the successful party relied, *first*, upon an argument founded on general principle; and *second*, upon an argument rested upon special usage. The *gist* of the former argument was, that the contract of steelbow was not mutuum, but a location of movable goods to be possessed along with the lands, and which goods formed an *universitas*, which the lessee was entitled to administer by parting with and replacing individual portions of it, but which he could not dilapidate by an unnecessary alienation. The latter argument was founded upon evidence of local usage, by which it appeared that it was established in practice in the part of the country in which the farm was situated that the lessor had a right to the steelbow goods preferably to the creditors of the lessee. And from this evidence there was derived an argument from expediency.⁶ It does not appear by which of those classes of argument the Court was convinced. If by the latter, the decision cannot be considered as having determined the general point, and therefore the doctrine of the older authorities was not overruled.

No case involving the question having subsequently occurred,

¹ 3 Ersk. i. 18; Bell's Pr. 200, 1264.

² Ersk. *ut sup.*; 1 Bankt. xii. 3.

³ L. Durie v. Duddingstone, 1549, Mor. 14,735. Boyd v. Russell, Lawson v. L. Boghall's Tenants, V. Belhaven v. Lady Luss, and Dundas v. Brown, *ut sup.*

⁴ A. of S. 28 Feb. 1666, pp. 98-9; 1 Bankt. xii. 3.

⁵ 1 Bankt. xii. 5.

⁶ Butter, &c, v. M'Vicar, *ut sup.*

the matter is to be deemed open. But, on principle, the broad doctrine of the older authorities is very questionable. Steelbow goods are originally the undoubted property of the landlord, and are granted by him to the tenant along with the farm, and for the express purpose of cultivating [816] it upon condition of paying an additional rent during the currency, and of restitution in specific value upon the expiration of the lease. The true nature of the contract, therefore, appears to be that of location, involving the same power of administration in applying the steelbow goods to the cultivation of the land as is involved in the management of the land itself, considered as the subject of temporary occupation for the purposes of culture. Nor is the doctrine stated in the case last mentioned¹ without support from ancient authority; for, in an old case, a part of the Court was of opinion that the tenant had the use only, and not the property, of the steelbow goods;² while, according to the opinion of Bankton, a strong analogous argument is derived from the preference given to the landlord by the "orders to the commissaries" already mentioned.³

Steelbow a kind of location.

SECTION II.—ORDINARY SUBJECT MATTER OF STEEBOW GOODS.

It has been already stated of what steelbow goods consist when given in the most complete manner; and that in practice they are now ordinarily limited to manure, straw, and fodder.⁴ While the increase of agricultural capital gradually occasioned the discontinuance of other kinds of steelbow, strong expediency has rendered it proper that these articles should continue to be steelbow even in the best cultivated parts of the country. Manure being indispensable for proper cultivation, and being seldom to be purchased except in the immediate neighbourhood of large towns, an incoming tenant would be devoid of the means of culture unless he were to receive the manure made, but not used, by the outgoing tenant. The same principle applies to straw, fodder, and the other materials forming essential ingredients in the composition of manure, which, therefore, it is important to retain upon the farm in order to be converted into manure. Although these objects can be, and are, attained by other provisions, it is a common and a convenient mode of attaining them by contracting that the manure, straw and fodder shall be steelbow goods, either during the whole currency or during

Subjects of steelbow: manure, straw, and fodder.

¹ *Butter v. M'Vicar, ut sup.*

² *Boyd v. Russel, ut sup.*

³ *Orders to Commissaries, A. of S. ut sup.*; ² *Bankt. iii. 173.*

⁴ *Supra*, sec. I. of this chap. p. 327.

such a part of the lease towards the expiration as shall be deemed requisite.¹ By a declaration that they are steelbow, it is assumed that they are given by the landlord, and are to be returned to him; or, what is equivalent, delivered to the incoming tenant, to whom the landlord has conveyed his right to them. A sufficiency of manure and of the materials for its formation are thus permanently retained upon the farm. The necessity for this precaution may, [317] perhaps, at some not very distant time, be superseded by the use of other manures discovered by means of those chemical researches towards which the attention of agriculturists has of late been so successfully directed. But in the actual state of the science of agricultural chemistry it would be premature to relax the restrictive provisions.

These provisions being necessarily embodied in special clauses, the details will be more aptly examined when treating hereafter of the purport and results of the several clauses of the contract of lease. At present, therefore, their general aspect only shall be considered.

Clause of
steelbow in
leases.

In the older Style Books a clause is inserted as having been observed in leases, which purports that, as the lessee has got the whole dung upon the farm "for the labouring of bear land," and a certain quantity of hay, he bound himself to leave as much dung and the same quantity of hay.² The clause has been expressed in various modes in modern leases. *1st*, The form may be that of an explicit declaration that the lessee shall leave the manure and straw upon the premises "in steelbow" at the conclusion of the lease.³ Or *2d*, The lessee may be prohibited from disposing, during any period of the lease, of any part of the produce except cattle or grain thrashed out, unless with the consent of the lessor, and under the condition that the lessee shall bring otherwise a quantity of putrescent manure equal to what might have been derived from the commodities carried off the farm.⁴ Or *3d*, There may be inserted a general declaration that the lessee shall consume by means of his stock the whole straw and fodder, and lay upon the lands the whole dung which shall be made, and that he shall not sell any part of the dung.⁵

Construc-
tion.

Where a provision creating steelbow exists, it has been so construed as fairly to accomplish the object contemplated, although the terms be apparently narrow. In consequence, where a farm was a steelbow farm in so far as regarded the straw, it was argued

¹ Bell's Pr. 1261, 1264.

² Spotta, Styl. 367.

³ 1 Jurid. Styl. 2d edit. 638, and 3d edit. 687-8.

⁴ 1 Jurid. Styl. 3d edit. 687-8.

⁵ 1 Jurid. Styles, 4th edit. 470-1.

that it followed of course that the dung could not be carried off in consistency with the obligation thence arising; and it was held that the lessee could not sell the dung, which if not used went with the land.¹ Although the authority of this case has subsequently been shaken, as containing a general rule relative to the application of manure to the land, yet on this doctrine it has continued unimpeached;² and it has been said with relation to it "that the farm was steelbow," and "that the tenant could not sell an ounce of dung."³

Nor, with relation to manure and its materials, has the prohibition [318] to sell been limited in the case where there were inserted stipulations directly or necessarily constituting those articles to be steelbow. A prohibition to sell, or in other words, the constitution of steelbow, was held to be a part of the implied obligations of a lease.⁴ On this principle, it was laid down that a tenant cannot sell fodder off his lands unless he either bargain with the purchaser for the dung produced, or purchase as much for the use of the farm; and therefore it was decided that a lessee was not entitled to dispose of any part of the fodder raised upon the farm, except hay and the straw of his outgoing crop, although there was no clause in the lease expressly prohibiting him from selling it.⁵ And in a subsequent case the rule was recognised as applicable, not only to the original or principal lessee, but also to assignees and sublessees.⁶

Prohibition to sell manure implied in leases.

CHAPTER XIV.

GAME.

As formerly mentioned, those subjects of the contract of lease which remain to be discussed do not involve a right to the soil or its adjuncts, but consist of a right to certain privileges, or of a conveyance to certain profits.⁷ Of this class a lease of the right of taking game is now one of the most common. A lease of game

¹ *Fernie v. Mitchell*, 1767, Mor. 15,260-1.

² *Berry v. Allen*, 17 Jan. 1827, F.C. 130, 5 S. 212.

³ *Per Lord Alloway in Berry v. Allen*, *ut sup.*, 5 S. 212.

⁴ 2 Ersk. vi. 39, Note †; 2 Stair, ix. 43, Note a, No. iv. (by Brodie).

⁵ *Pringle v. M'Murdo*, 1796, Mor. 6575 [see below vol. ii.]

⁶ *E. Northek v. Rolland, &c.*, 1797, Mor. 15,254; Stair, Note, *ut sup.*

⁷ A lease of a railway may theoretically be deemed exceptional to some extent, but practically it must so be dealt with by reason of the great subordination as to soil and its adjuncts, and other qualities.

Two kinds
of game
leases.

may be of two kinds. *First*, There may be a lease of land stocked with game of a particular kind, and let for the exclusive purpose of maintaining the game, combined with the exclusive privilege of taking it. And *Second*, There may be a right to take game granted to a person different from the lessee of the lands. Leases of game, unknown until a recent period, have of late become frequent and important, and constitute a considerable source of revenue to landed proprietors.

SECTION I.—PRINCIPLE AND TENOR OF LEASE OF GAME.

Art. 1.—
Principle of
game leases.

Principle.

This species of lease, which is of a peculiar nature, rests upon the principle that the proprietor of land transfers to another, for a [319] valuable consideration and a limited time, the right which he has of hunting and shooting upon his lands, and of prohibiting all others from entering upon them for that purpose. This principle arises from the combination of the following rules:—*1st*, A proprietor is entitled to prevent all persons, however qualified, from hunting or taking game upon his grounds, whether inclosed or uninclosed.¹ *2d*, Neither the lessee of the lands nor any one else can prevent the proprietor from pursuing and taking game upon his own grounds.² *3d*, By the constant usage of Scotland, a qualified person may grant permission to shoot over his own lands to a person who is not himself qualified; and a person so having permission from a qualified person may lawfully have in his possession the game which he has killed in virtue of such permission.³ But *4th*, The right of shooting is not the constitution of a separate tenement, but merely the delegation or communication of a certain privilege.⁴

Tendency to
assimilate
game leases
to leases of
lands.

While hitherto no alteration on the principle of such a lease has been explicitly recognised, a material alteration on its legal results appears to be in progress, by which it is becoming more

¹ 2 Craig, viii. 18; 2 Stair, iii. 76, and Note c (by Brodie); 2 Bankt. i. 7; 2 Ersk. vi. 6; Bell's Pr. 949; 2 Hutch. 550; Tait's Justice of Peace 136; 1555, c. 61, 1655. Watson v. E. Errol, 1763, Mor. 4991. M. Tweeddale v. Dalrymple, 1778. Mor. 4992, Hailes 790, 5 B. S. 475. E. Breadalbane v. Livingstone, 1790, Mor. 4999, Hailes, 1084; aff. 1791, 3 Pat. 221.

² 2 Ersk. vi. 6; Bell's Pr. 953, 1224, 1226; More's Notes, colv.; Stair, *ut sup.* Note c (by Brodie); 2 Hutch. 551; Tait,

ut sup. Ronaldson v. Ballantyne, 1804, Mor. 15,270. E. Hopetoun v. Wight, 17 Jan. 1810, F.C. 507. M. Tweeddale v. Somner, 18 June 1808; reported in note to E. Hopetoun v. Wight, *ut sup.*

³ 2 Ersk. vi. 6, Note; Bell's Pr. 950; Note c to Stair, *ut sup.*; Tait, 132. Trotter v. Macewan, 8 July 1809, F.C. 406.

⁴ Bell's Pr. 951, 952. Pollock, Gil-mour, & Co v. Harvie, 5 June 1828, F.C. 968, 6 S. 913.

assimilated to a lease of the productive powers of land. By the 1 and 2 Will. IV. c. 32 (5th October 1831), certificated persons may sell game to licensed dealers; and under that law the sale of game is now open and avowed.¹ Game has in consequence become an object of traffic, and so the Courts have dealt with it in considering the effect of a lease of it. The widow of an heir of entail was found to be entitled to an annuity of one-fourth of the rents, and it was held that the rent derived from letting the game on the estate was to be taken into calculation in computing the annuity.² The doctrine was laid down by the Lord Ordinary (Moncreiff), with whom the Court concurred, that the practice of letting ground on account of the game and the profitable returns obtained from it have altered the [320] nature of such property; that the ground is let for a rent, which return is to be deemed a portion of the actual rent of the land part of the estate. The doctrine of this case was confirmed in a subsequent one by the opinions of a majority of the whole judges, and it was solemnly decided that in ascertaining the amount of provisions which may be granted by an heir of entail in possession, the annual rent of game let and in the use of being let is to be taken into computation.³ The doctrine was confirmed on the last resort, and the confirmation was accompanied by the expression of strong and decided opinions. It was said that where sheep were laid aside and the ground used exclusively for the rearing of grouse, there could be no reason why, if the produce of the ground is so devoted, the profit thence arising should not be considered the annual rent of the land just as much as if the produce was devoted to the feeding of wild or tame stock, for it is a rent received substantially for the use and occupation of the lands.⁴ In a subsequent case there was an extension of the principle when it was held that the value of the shootings on the locality-lands of an entailed estate, although they had not been previously let, were to be taken into computation along with the value of the other shootings in ascertaining whether the provision made by way of locality exceeded the amount allowed by the entail.⁵

In questions
as to provi-
sions under
entails.

The data on which the computation was to be made were in one case held to be that, in calculating the annuity the value of the game-rent was to be computed according to the rent received

Computa-
tions of
annuities
under
entails.

¹ Woodfall by Wollaston, 557, Bell's Pr. 954.

² M'Pherson v. M'Pherson, 24 May 1839, F.C. 873, 1 D. 795.

³ Sinclair v. Lord Duffus, 24 Nov. 1842, 5 D. 174, 15 Jur. 40.

⁴ Per Lord Campbell in M'Pherson v. M'Pherson, 13 Aug. 1846, 5 Bell's App. 280.

⁵ Menzies v. Menzies, 10 March 1852, 14 D. 651, 24 Jur. 365.

prior to the husband's death, and (by the widow's consent) was to be calculated according to an average of the rent received during the year in which he died and the five preceding years.¹ But in a subsequent case it was held that the valuation must be as at the death of the former proprietor, and according to the fair rent that would have been obtained for the shootings had they been let then in the ordinary course of management, but without the mansion-house, the lessee being left to provide himself with house-accommodation.²

Shooting
lodges.

There is a recent case which it may be deemed tends to derogate from the doctrine of the previous decisions, for it was held that expenditure on shooting-lodges does not come within the statutes as an improvement on the land of an entailed estate. But if a rent for shootings is one received substantially for the use and occupation of the land, there may be reason to deem that a shooting lodge, which, if not an [321] indispensable accessory, is an important one, is an improvement of the land let for such a purpose, as much as a convenient steading would be on an agricultural farm and the rejection of the claim would appear to indicate a repudiation of the doctrine of the precedents.³ But this result being inferential only, the question not having arisen *in foro contentioso*, and there having been apparently no detailed discussion or opinions, it is not subversive. While the doctrine which the decisions establish is in accordance with equity and the actual state of the returns from landed property, it places the contract which it affects in an anomalous position; for, without raising game to the rank of an adjunct of land, so that a lease of it may be protected by the Statute 1449 against singular successors, it recognises the rent as forming a portion of the land part of the estate, and therefore as issuing from the soil or its adjuncts.⁴

A lease of
land for
sporting,
with exclu-
sive posses-
sion.

[It has been held that a lease of lands for sporting purposes, whereby the lessee has the exclusive occupation of the lands—which are not capable of being occupied profitably for other purposes, is valid against singular successors;⁵ and an opinion was expressed by Lord Kinloch that—"supposing the lease had been one of shootings merely," it would have been competent for an heir of entail to grant it. "Whatever was at first held theoretically, I think the progress of society and the practice of the country have

¹ *M'Pherson v. M'Pherson*, 16 Feb. 1843, 5 D. 861.

² *Menzies v. Menzies*, 10 July 1855, 17 D. 1090, 27 Jur. 554; [aff. 29 July 1861, 23 D. (H. L.) 16, 33 Jur. 718.]

³ *Duke of Athole*, Pet., 3 July 1855,

17 D. 1015, 27 Jur. 517.

⁴ *Vide* Irvine on the Game Laws, 2d edit. (Leases of Game), 36-8.

⁵ [Farquharson, Pet., 3 Nov. 1870, 9 Macph. 66. See *E. of Fyfe v. Wilson*, 14 Dec. 1859, 22 D. 191.]

now placed shootings in the common category of property, and given to a lease of shootings the proper character and legal effect of leases generally." In an earlier case a lessee of shootings was held to be an occupant of lands and heritages, and therefore liable to an assessment for the poor under 8 and 9 Vict. c. 83.¹

But the rule in *Pollock, Gilmour, & Co.*,² that the Act of 1549 does not protect an ordinary lease of shootings against singular successors, has not been overruled.³

1st, LEASE OF A DEER FOREST.—While the lease of a deer forest is peculiar, it approaches more nearly to an ordinary lease of land than does a mere lease of the right of taking game. The real subject-matter of the lease is, not the land, but the deer with which it is stocked. But as the land must be strictly appropriated to feeding and preserving them, the lessee of the deer must also be the lessee of the land.⁴ The land, therefore, is let for a yearly rent or grassum, with the exclusive right and privilege of killing the deer (the other game being also ordinarily included), and with the consequent right of debarring the lessor from putting any other stock upon the land. The counter obligations are, that the lessee shall put no other stock upon it; and that he shall so use his privilege of killing the deer that the stock shall be duly preserved, expressed by the terms "that he shall use his right in a fair and sportsman-like manner."⁵

The construction of such a lease has recently been subjected to discussion and decision.⁶ A deer forest was advertised to be let. In a correspondence with an intending lessee, an assurance was given by the proprietor that there were seven hundred head of deer in the forest, and that he had killed thirty-five head of stags the preceding season. The intending lessee sent his gamekeeper to visit the forest. He did so along with the proprietor in the month of May. The gamekeeper saw only four or five lots of deer, with about nine or ten stags among them; but the proprietor gave him the same assurance as he had previously done in writing. A lease was then entered into; but the lessee, as averred, found, after repeated trials during the shooting season, that the forest was [322] not frequented by stags, but only by hinds. An action of re-

Art. 2.—
Tenor of
Lease.

Earl of
Wemyss v.
Campbell.

¹ [Stirling Crawford v. Stewart, 6 June 1861, 23 D. 965.]

² [Supra, p. 332, Note.]

³ [See *Birkbeck v. Ross*, 22 Dec. 1865, 4 Macph. 272, where Lord Brougham decided in conformity to the rule referred to. *Dawson v. Stewart*, 20 Oct. 1869, 8 Macph. 10 (Regn. Appeal Court).]

⁴ [An example of this exclusive occupation of the land, and its legal result, is found in the case of *Farquharson*, *cit.*]

⁵ Append. No. xvi.

⁶ *E. of Wemyss v. Campbell*, 6 June 1858, 20 D. 1090, 30 Jur. 537.

duction of the lease having been raised, it was held by a majority of the Judges that the pursuer, although he had sent a gamekeeper to inspect the ground before entering upon the lease, was entitled to an issue to try whether what was let was a deer forest, and whether he had entered into the lease under essential error as to the substance of the contract, and an issue to try the question was accordingly adjusted. The opinion of the majority of the Court was rested on the ground that the land having been let as a deer forest, the purport of which was matter of notoriety, and it being averred that it was not a deer forest, the pursuer was entitled in the form of a reduction to ascertain whether he had obtained possession of the subjects stipulated for under the contract. The ratio of the opinion of the Lord Justice-Clerk (Hope), who differed, was, that the lessee was barred from challenging, by reason that it lay on him, before entering into the contract, to ascertain the true nature of the subject, and that he had made inquiry, which, although fallacious, debarred challenge.¹ There appears to be considerable force in this ratio.

Ordinary
game lease.

2d, ORDINARY LEASE OF GAME.—The tenor of an ordinary lease of game is, that for a grassum or yearly rent there is granted to the lessee and his heirs the whole game upon the lands, with the sole privilege of pursuing, killing, and taking the same during the time specified, the lessee being bound so to use his right as that the breed may be preserved.² [A lease of the "whole game and shooting of every description" on certain lands, "with the sole and exclusive right of hunting for and killing the same in terms of law," was held to include the right of shooting rabbits to the exclusion of the landlord and those deriving right from him, without prejudice to any question as to the agricultural tenants' right to kill rabbits if destructive to their crops.³]

Rabbits.

Art. 9.—
Is there an
implied
power to
assign or
sublet?

Whether there is, independently of actual stipulation, a power to assign or sublet, is an open question. Where the tenant of a large estate had a right to the game and to appoint gamekeepers, it was held that he had a right to exclude persons not having his permission to hunt, shoot, or kill game.⁴ But as a right to give permission is here assumed, the right of doing so for a valuable consideration, or, in other words, of subletting, appears to follow. A

¹ The jury found that the lease was bad, the proof establishing a hind, but not a deer, forest.

² Append. No. xvii.; Pollock, Gil-

mour, and Co., *ut sup.* art. i. of this sec. p. 332.

³ [North and George v. Cumming, 2 Dec. 1864, 3 Macph. 173.]

⁴ Innes v. Partridge, 1826, 4 S. 761.

right to protect the game is, indeed, prominently brought forward, but this may have arisen from the peculiar position of the lessee, whose lease had been reduced by the Court of Session by a judgment which was under appeal; and therefore permanent permission to take the game could not be contemplated by the Court in the interdict case. This, however, does not impugn the general inference to be drawn from the doctrine of [323] the case. Even although there should be no such power, there is reason to think that assignees and sublessees would be admitted unless expressly excluded; because, although some of the elements of *delectus personarum* might be deemed to exist, the law has a repugnancy to the extension of that doctrine, and it is practically disregarded in such leases, as they are often granted, after advertisement, to mere strangers.¹

SECTION II.—EXCLUSION OF POWER OF LEASING GAME.

In cases where there exist rights subordinate to the right of property, the power of leasing game is excluded. 1st, A servitude of pasture does [not] include the right of killing, and consequently of leasing game on the servient tenement.² 2d, In a case of common³ it was held that, perhaps as an ordinary use, one joint proprietor may himself be entitled, without the consent of the other, to shoot on the common, or even gratuitously to grant permission to his friends to shoot there; but that a grant of a liberty to shoot "made by a lease for a rent" was not at all an ordinary use of the common, and therefore it was not effectual without the express consent of both of the joint proprietors.⁴

3d, A person having a *jus aucupandi* over a forest, the property of another, may lawfully exercise the right, either personally or by his gamekeeper duly authorised, or by any qualified friends whom he may permit, whether his tenants or not, or whether he be personally present or not, provided he do not exercise it abusively, or encroach unreasonably, or absorb the general right of fowling as well as of hunting belonging to the proprietor of the forest.⁵ Throughout this case the opinions embody a limitation to gratuitous

Servitude of pasture—common.

Privilege of hunting and fowling in a forest.

R. of Aboyne v. Innes.

¹ [See, *contra*, opinion of Lord Kinloch in *K. of Fife v. Wilson*, 24 Dec. 1864, 3 Macph. 323; and see *North and George v. Cumming*, 2 Dec. 1864, 3 Macph. 173.]

² 2 Ersk. vi. 6, Note; 2 Stair, iii. 76, Note c (by Brodie); Tait's Justice of

Peace, 135. *Forbes v. Anderson*, 1 Feb. 1809, F.C. 121.

³ Ersk. *ut sup.* *Campbell and Stewart v. Campbell*, 24 Jan. 1809, F.C. 100.

⁴ 2 Ersk. vi. 6, Note 83; Stair, Note, *ut sup.* *E. Aboyne v. Innes*, 23 Jan. 1813, F.C. 384; aff. 10 July 1819, 6 Pat. 444.

permission, and it was expressly said that if the possessor of the right was to farm it out, or convert it into a means or engine of profit or advantage, the proprietor of the forest would be entitled to interfere.¹ Combining these views with the doctrine that the possessor could not absorb or exclusively use the right of fowling, the power of leasing appears to be excluded, notwithstanding an opinion that the tenants of the mansion-house might shoot.² But that opinion seems to make it difficult to draw a distinction between letting that house with the privilege of shooting and letting a right to shooting. In a subsequent case, where there was in a sasine a reservation in favour of two individuals and their families, and persons residing with [324] them, of a right of shooting over certain lands, the Court refused to limit the exception to the families, &c., of those individuals.³ But a power of leasing, in opposition to the doctrine of the preceding case, does not appear to have been contemplated.

CHAPTER XV.

TOLLS, FERRIES, AND CUSTOMS.

A right to levy duties or imposts for public purposes, or as matter of patrimonial interest, is in many instances vested in public bodies and individuals. Of this description are the dues of tolls, ferries, markets, and harbours. To secure a specific sum, the administrators or proprietors of such rights generally let or farm them for a limited period.

SECTION I.—TOLLS.

1. *Roads*.—Toll duties being the creation of statute, are necessarily regulated as to amount, modes of levying, and similar details, by the statute, special or general, by which they are imposed.⁴ The General Road Acts are 4 Geo. IV. c. 49 (4th July 1823), and 1 and 2 Will. IV. c. 43 (15th October 1831).⁵ It has been held, *first*, that each local Act is to be read as if the general Act were incorpo-

¹ *Per* Lord Justice-Clerk (Boyle).

² *Per* Lord Glanlee.

³ *Carnegie v. L. Kintore, &c.*, 15 Dec. 1869, 8 S. 251. [See, on the construction of such clauses, *D. Richmond v. Duff, supra*, p. 279.]

⁴ 2 Bankt. vii. 25, and *Obs. on Law of England*, eod. Tit. 11; *Bell's Pr.* 661; 2 *Hutch.* 489-92; *Tait's Justice of Peace*, 161-2.

⁵ [The General Statute Labour Act is 8 and 9 Vict. c. 41.]

rated in it;¹ and *second*, that all regulations in local Acts not inconsistent with the rules of the general Act are effectual notwithstanding the extension of that statute.²

In leases of tolls there are let the toll-duties, conformably in amount to the provisions of the Act imposing them, which may be collected at the different turnpike gates or bars erected at the different places described in the lease, and at any bar which may be altered or erected during the currency of the lease at the different stations at which the trustees are empowered to erect them, with the exception of the tolls on mail coaches, which cannot be farmed. Full power and warrant are given to the lessees to demand, uplift, take, collect and receive the toll-duties. Where trustees are authorised to compound, and have compounded, with individuals, the [325] lessee is entitled to receive the composition specified in the lease. But a composition made by the trustees is binding on the lessee. A lessee obtained a right to certain tolls under articles of roup, which reserved a right to the road trustees to make compositions for the toll-duties on omnibuses carrying passengers. The trustees at a meeting fixed the tolls to be paid by an omnibus at a rate paid for a period of several months previous, during which it had run at a modified rate. An action was raised by the lessee against the coach-proprietors for the full rate. It was held that the fifty-third section of 1 and 2 Will. IV. c. 43, warranted the procedure of the trustees, and that the lessee was not entitled to recover the full tolls.³

Along with the duties, the toll-house, toll-bars, weighing-machines, and similar apparatus are granted to the lessee.

[It was held that the limitations of actions to six months from the date of the wrong complained of, in the 118th section of the Act 1 and 2 Will. IV. c. 43, did not apply to an action by a tacksmen of tolls against the road trustees for repetition of rent and damages for non-implementation of the conditions of let.⁴

The General Road Act gives the Sheriff jurisdiction, which is final, over tacksmen of tolls on the complaint of the clerk or treasurer of the road.⁵

2. *Tolls on Canals*.—The 8 and 9 Vict. c. 42 (21st July 1845), is entitled "An Act to enable Canal Companies to become Carriers of Goods upon their Canals." By the first section, proprietors,

¹ Bell's Pr. *ut sup.* Simpson v. Harley, 25 June 1830, F.O. 803, 8 S. 277. Wilson v. Leith Walk Tr., 1831, 9 S. 725.

² Bell's Pr. *ut sup.* Baillie, &c. v. Mackenzie, 1826, 4 S. 834. M'Callum v. Speirs, 1827, 5 S. 541.

³ Macdonald v. Philp, &c., 19 June 1847, 9 D. 1300, 19 Jur. 558.

⁴ [Somerville v. Gordon, 23 Dec. 1842, 6 D. 383, 15 Jur. 171.]

⁵ [Erskine v. Kerr, 15 Dec. 1857, 90 D. 277.]

trustees, or undertakers of canals, have the necessary powers. By the eight section, canal companies may lease their tolls and duties to any other canal or navigation company for any period not exceeding twenty-one years, and the letting must be after certain notices. According to the ninth section, the lessees and their nominees are to be deemed the collectors of the tolls let, and are to be liable accordingly. In terms of the tenth section, if the lease become voidable by the failure of the lessee to fulfil the stipulations, or by his being in arrear of rent for twenty-one days, a Justice of Peace may, on application, enter the premises and remove the lessee and take possession of the property belonging to the lessors. By the eleventh section, on such possession by the lessors the lease shall be void, except as to the remedies for recovery of the rent and for unperformed stipulations, and the company may relet the tolls and levy them during the prosecution of their remedies. According to the twelfth section, the Act does not extend to canals and navigations the property of which is vested in shareholders, unless it shall have been adopted by them at a meeting called and governed according to rules laid down in the statute; and by the thirteenth section the Act does not exempt canal companies from the operation of any General Canal Act.

There is a partial repeal or modification of this statute by the 21 and 22 Vict. c. 75 (2d August 1858) [made perpetual by 23 and 24 Vict. c. 41, s. 1], by the third section of which it is enacted that notwithstanding anything contained in the previous statute, "it shall not be lawful for any canal or navigation company, being also a railway company, or entitled to work any railway constructed under the authority of any Act of Parliament, hereafter to accept a lease of the whole or any part of the undertaking of any other railway and canal [326] company, or of any canal or navigation company, or of the tolls, dues, or charges upon or in respect of the whole or any part of any such undertaking, except under the powers of some Act or Acts heretofore passed or to be hereafter passed, in which the parties to any such lease shall be specifically named and authorised to enter into the same."

SECTION II.—FERRIES.

Public and
private
ferries.

Ferries are created either by a Special Act of Parliament, when they are styled Public, or by a grant from the Sovereign to a particular person, when they are styled Private. In the former case the right is ordinarily vested in trustees, and the amount of rates to be

levied and the other details must necessarily be governed by the statutory regulations. Where there is an ordinary grant, or where the statute leaves the rates open to the operation of the ordinary rules, the Justices of Peace are, by a series of statutes explained by decisions, empowered to regulate the amount. And where there are statutory provisions, as by the 20 and 21 Vict. c. 148 (17th August 1857), section fifty-second, relative to the ferry-boats, the lessee must take his right subject to them.¹ In consequence, where there is a lease the lessee must take his right subject to the alterations which such regulations may affect.

The grant of a ferry implies a power of imposing a duty *pro opere*, and a ferry is a patrimonial right upon which moderate profits may be made.² These consequently may be let or farmed. A lease of a ferry is a contract which has been long recognised, and in dealing with it and illustrating it the same phraseology is used as is applied to a lease of heritable property.³

1st, The lessor grants to the lessee the vessels, if such belong to him, as steam-boats, sail-boats, cutters, and ferry-boats, with their appurtenances, as specified and contained in an inventory referred to in the lease.⁴

[327] 2d, There is conferred the exclusive right of navigating the passage or ferry in so far as it belongs to the lessor, and all right which the lessor has to the harbours, piers, quays, and landing-places, and of levying the duties vested in him at the date of the lease.⁵ The proprietor, and consequently the lessee, is entitled to crave an interdict against any person who establishes another ferry without an express grant to that effect, either within or so near the old one as to injure him in any respect.⁶ At one time it was held that other heritors may transport themselves and their families or others gratuitously across, but not for hire, so as to interfere with the right of ferry.⁷ There was afterwards introduced the limitation that no person can be carried over gratuitously except the owner, his family, servants, visitors, and persons in his employ-

¹ 2 Bankt. iii. 5, and 2 Bankt. vii. 24.

² Ersk. iv. 14. Bell's Pr., sec. 652-3.

³ Hutch. 492-4. Tait, 151-3. 1669, c. 16; 1670, c. 89; 1686, c. 8; 5 Geo. I. c. 30; 4 Geo. IV. c. 66; 3 and 4 Will. IV. c. 23. *Maga. of Montrose v. Scott*, 1755, Mor. 4167. *E. Moray v. Maga. of Kinghorn*, 1762, Mor. 1938-90. *Justices of Peace of Midlothian and Fife v. Galloway*, 1776, Mor. 7620. *Martin v. Easton*, 1830, 8 S. 952.

⁴ 2 Ersk. vi. 17; Bell's Pr. *ut sup.* *Maga. of Montrose v. Scott*, *ut sup.*

⁵ Taylor v. Brown, 1800, Hume 308.

⁶ App. No. xviii.

⁷ App. No. xviii.

⁸ Campbell v. Campbell, 18 Jan. 1815, F.C. 146; [aff. 18 Feb. 1819, 6 Pat. 417.] *Ferguson, &c. v. Macdowall, &c.*, 18 Jan. 1815, F.C. 152. *Tra. of Kinghorn Ferry v. Crichton*, 1821, 1 S. 220. [*Maga. of Kirkcaldy v. Greig*, 18 July 1846, 8 D. 1247.]

⁹ Tarbet v. Bogis, 1731, Mor. 4167.

ment.¹ But an interdict was refused (a bill of suspension having been passed to try the question) against the proprietors of steam-boats landing and receiving passengers at a certain point on a river, in their passage up and down the river, in alleged violation of a right of ferry.²

3d, Where there is a ferry-house or other property attached, it is generally let along with the ferry.³

SECTION III.—CUSTOMS.

Customs, imposts, or dues, are certain duties leviable upon commodities brought into harbours or burghs, or sold in markets. They occasionally belong to individuals, but generally to burghs or other communities, and are established either by statute or immemorial usage, founded on a grant from the Crown.⁴

Amount of
customs
leviable.

[328] The lessee must take the custom or impost both in kind and amount, conformably to the usage established at the date of his lease. Where an agreement fixing the amount was made between the proprietor and the dealers, it could not be altered without the consent of parties.⁵ Nor has the proprietor of the custom power either to vary its kind by impositions upon articles not formerly subjected, nor to add to its amount. Such powers are vested in Parliament alone.⁶ In consequence, where magistrates levied an

¹ *Martin v. Thomson*, 16 June 1818, F.C. 538. [*Weir v. Aiton*, 25 May 1858, 20 D. 968.]

² *Hunter v. Napier and Mackenzie*, 1830, 9 S. 86.

³ [See, as to the nature of a right of ferry and adjuncts, such as houses and piers, *Baillie v. Hay*, 20 March 1866, 4 Macph. 625.]

⁴ 1 Craig, xv. 15; 2 Stair, i. 5, and iii. 61; 2 Ersk. vi. 17; Bell's Pr. 654-8, 664-6. *Maga. of Lander v. Brown*, 1754, Mor. 1987. *E. Moray v. Maga. of Kinghorn*, 1763, Mor. 1988. *Boog and Thomson v. Maga. of Burntisland*, 1775, Mor. 1991. *Tod v. Maga. of St. Andrews*, 1781, Mor. 1997. *Ferguson v. Maga. of Glasgow*, 1786, Mor. 1999. *Skene v. Ross*, 1794, Mor. 7401, Bell's Cases, 46. *Incorp. of Fishers of Glasgow v. Maga. of Glasgow*, 15 June 1802. *Maga. of Edinburgh v. Fishers of Edinburgh*, 1799, Mor. (Burgh Royal) App. 6; rev. 24 June 1803, 4 Pat. 375. *Reid and Maga. of Edinburgh v. Boyd*, 6 Dec. 1810, F.C. 72. *Fishers of Kirkcaldy v. Maga. of Kirkcaldy*, 17 Dec. 1822, 2

S. 96. *Cowan v. Maga. of Edinburgh*, 22 Feb. 1822, F.C. 609, 6 S. 586. *Christie v. Landale*, 16 May 1823, F.C. 870, 6 S. 813. *Maga. of Dunbar v. Kelly*, 1829, 8 S. 128, 2 D. and A. 56. *Hill v. Maga. of Edinburgh*, 1829, 8 S. 449, 2 D. and A. 223. *Campbell & Co. v. Maga. of Edinburgh, &c.*, 6 July 1839, 1 D. 1174, 11 Jur. 605. [*Maga. of Linlithgow v. Edin. & Glasgow Ry. Co.*, 17 July 1845, 7 D. 1071, 17 Jur. 554; 29 May 1849, 21 D. 1215; rev. 28 July 1859, 21 D. (H. L.) 16, 3 Macq. 691, 31 Jur. 680.]

⁵ *Fishers of Glasgow v. Maga. of Glasgow*, *ut sup.*

⁶ 2 Stair, iii. 61, Note (by Brodie). *Maga. of Lander v. Brown*, *E. Moray v. Maga. of Kinghorn*, *Boog and Thomson v. Maga. of Burntisland*, *Tod v. Maga. of St. Andrews*, Judgment of H. of L. in *Maga. of Edinburgh v. Fishers*, *Reid v. Boyd*, *Fishers of Kirkcaldy v. Maga. of Kirkcaldy*, *Cowan v. Maga. of Edinburgh*, *Christie v. Landale*, *Maga. of Dunbar v. Kelly*, *ut sup.*

impost (neither expressly sanctioned by statute nor supported by immemorial usage), after having published it in a schedule of duties which, contrary to the fact, bore to be conformable to an Act of Parliament, they were found not to be protected from repetition by a plea of *bona fides*.¹ But where there was, in a private Act of Parliament, an ambiguous clause as to the amount of dues authorised to be levied, it was interpreted consistently with the usage of levying as established upon proof.²

There have been two deviations from the older law. 1st, Although it was held that the lessee of the petty customs of a royal burgh could have no rule for charging the customs except the table which he received from the magistrates (which is necessarily still law), yet it was decided, *first*, that the table might be altered by the magistrates;³ and *second*, that the table might be altered by the practice which had taken place in collecting the duty.⁴ But these doctrines, as already shewn, have been overruled. 2d, Formerly the Court of Session exercised the power of regulating those duties.⁵ The existing rule is, that although there were certain cases in which the Court seems to have exercised a kind of general superintendence over public markets, those notions having been exploded, the Court does not now, nor will in future, so interfere.⁶

The Statute 16 and 17 Vict. c. 93 (20th August 1853), is entitled [329] "An Act to enable Burghs in Scotland to maintain and improve their Harbours." In conformity with the twelfth, thirteenth, and fourteenth sections, schedules of rates are to be prepared and published, and are to be finally adjusted by the Board of Trade.

16 & 17
Vict. c. 93.
Burgh
harbours.

Harbour dues and other customs are ordinarily let from year to year. Regular articles of roup are prepared, which, when followed by possession, constitute the title of the lessee. There are occasionally joint lessees, who, if numerous, are accounted sufficient mutual guarantees, and therefore no other security is demanded. Payment by monthly instalments, and always in advance, is the mode sometimes adopted.⁷

¹ *Maga. of Dunbar v. Kelly*, *ut sup.*

² *Girdwood & Co. v. Campbell*, 1837, 6 S. 124; 1829, 7 S. 840; 1830, 9 S. 170.

³ *Skene v. Ross*, *ut sup.*

⁴ *Id. v. Evend.*, 9 Dec. 1794, Bell's Cases, 116. [*Maga. of Campbelton v. Galbraith*, 21 Feb. 1845, 7 D. 482. *Maxwell v. Provost of Dumfries*, 1 June 1866, 4 Macph. 764.]

⁵ *Peacock v. Maga. of Edinburgh*, 1783, n. r., noticed in *Cowan v. Maga. of Edinburgh*, *ut sup.*, F.C. No. 71, p. 614. *Ferguson v. Maga. of Glasgow*, *ut sup.*

⁶ *Per L. J.-C. (Boyle) in Christie v. Landale*, *ut sup.*, F.C. 878, 6 S. 817.

⁷ Report of Scotch Municipal Commissioners, part ii. pp. 14-15. *Glasgow Harbour Trust*. The reference is intended merely to give an example of the mode adopted where there is a good system of administration. Other modes and conditions of leasing, equally good, exist in other burghs and harbour trusts, of which there are notices in the Reports of the Scotch Municipal Commissioners *passim*.

SECTION IV.—RENTS, FEU-DUTIES, CASUALTIES, DUES OF OFFICE,
ETC., ETC.

Leases of
rents, duties,
&c.

A right to draw rents, feu-duties, casualties, dues of office, or similar emoluments, may be granted in the form of a lease.¹ Leases of the rents or maills and duties of an estate or houses under tenantry, and of feu-duties, are more particularly mentioned.² Such leases having been frequently granted by royal burghs, were made the subject of statutory regulations, and often occur in the Books and decisions.³ And in a case comparatively recent the validity of such a lease granted by a proprietor was recognised.⁴ But in modern practice leases of that nature are rare;⁵ and where a right to rents or maills and duties is given, it is ordinarily by assignation.⁶ Under the same general class might be ranked a lease of services prestatable by tenants,⁷ but which is very rare.

CHAPTER XVI.

LEASES OF WHICH EXCLUSIVE PRIVILEGE FORMS
THE ESSENCE.

Privileges
attached to
property let.

[330] In one class of leases the contract consists of a right to heritable property, combined with a conveyance to the lessee of an exclusive privilege from which pecuniary returns are to be derived. The essence of the contract consists in the right to the exclusive privilege, which must remain attached to the property during the currency of the lease, and the severance or deprivation of which would have the effect of wholly dissolving the contract; for the consideration given under the name of rent is for the right *in cumulo*, of which the profits accruing from the exclusive privilege form the material portion. In England there appear to exist

¹ Balfour, 200, 203, and 208; 2 Craig, x. 2; 2 Stair, ix. 3; 2 Bankt. ix. 1; 2 Ersk. vi. 27.

² Bankt. and Ersk. *ut sup.*; 2 Ross' Lect. 488, 504. Corneburn v. Pollock, 1682, Mor. 8472. E. Darnly v. Campbell, 1742, Mor. 13,839.

³ It. Cam. c. 39, sec. 37 and 45, 1491, c. 36. The King v. Burgh of Aberdeen, 1491, Mor. 7853; 1 Craig, xv. 16;

Mackenzie's Obs. 106, 286; 2 Ersk. iii. 15. Dean v. Magd. of Irvine, 1752, Mor. 2522-3.

⁴ L. Cathcart v. Schaw, 1785, Mor. 15,403; aff. 1756, 1 Cr. and St. 618.

⁵ 2 Ross' Lect. *ut sup.*

⁶ 3 Ersk. v. 6; 1 Bell's Com. 757; 2 Jurid. Styl. 3 ed. 343.

⁷ Gordon v. L. Forbes, 1774, Mor. 15,221.

numerous contracts of lease the constitution and validity of which depend on exclusive privilege, or other inherent qualities having similar legal characteristics and producing the like results. Examples of such contracts are afforded by the conveyance by the lessor to the lessee of the right to use a particular mark upon the goods manufactured in the premises let, and which mark is in law held to be a privilege inseparably attached to the premises.¹ The privilege of selling commodities within a certain manor or similar district, and the consideration given for the good-will of a shop long established within a particular locality, may likewise be given as examples, and a lease of the exclusive privilege of selling books at a railway station has recently been recognised as valid.²

Trade-mark.

Goodwill.

In Scotland there are instances of such exclusive privileges connected with trade, but it is believed that they are rare. There are others of a different and better known description connected with institutions of dissimilar character, viz., ecclesiastical buildings and places of public amusement. Examples will be given founded on judicial decisions, but a complete or even an extensive enumeration is unattainable.

SECTION I.—CHURCH SEATS.

In country parishes the tenant is entitled to accommodation in that part of the area of the church which belongs to the landlord; but in towns a different system must necessarily prevail, for reasons which are manifest. In royal burghs the magistrates and council [331] have been held to possess the power of levying rents for accommodation in the churches, the exercise of which has, in common parlance, been called "letting church seats."

The nature and extent of the right was deliberately examined and decided on in a recent case.³ The question was tried with reference to the provisions of the ecclesiastical establishment of a royal burgh, and to certain acts of council as to the seating of the churches and the application of the seat-rents, and with reference also to the consuetude of the burgh and to the common law. It was held, *1st*, That it was legal and competent for the magistrates

Letting of church seats by burghs. Clapperton v. Mags. of Edinburgh.

¹ [See *Motley v. Downman*, 3 My. and Cr. 1.]

² *Holmes v. Eastern Co. Ry.*, 3 K. and J. 326, 3 Jur. N. S. 737.

³ *Clapperton, &c., v. Mags. of Edinr.*, 15 July 1840, F.C. 1493, 2 D. 1385, 12 Jur. 643. The doctrine of this de-

cision was confirmed in a subsequent case between the same parties, under a special matter somewhat different, but to which the same principles and rules are applicable—16 July 1846, 8 D. 1130, 18 Jur. 561.

clauses of the statutory lease is unattainable, both, as already stated, by reason of the paucity of examples and of the variances which must occur; but an outline may be given of the more important provisions which characterise it as the contract of lease. The contract ought to proceed on a preamble setting forth the execution of the agreement, and may bear as follows:—1st, That immediately after the passing of the Act, or as soon thereafter as conveniently can be, the lessors shall execute and deliver in favour of the lessees a deed of lease in accordance with the provisions of the Act, for a term of years specified (probably one of long duration) from and after a date named. 2d, The subject-matter of the lease should consist of the railway works, lands, tenements, and the like subjects attached to the soil (plant). 3d, A right may be given to the use of the engines, carriages, and waggons, and the like movable articles, the terms of which require careful adjustment (rolling stock). Both as to the fixtures and the movable articles there ought to be special provisions as to the liability of upholding them.¹ 4th, There should be given right to levy and appropriate the revenue accruing from the railway and the other property leased. 5th, The rights, privileges, powers, and authorities given to or vested in the lessors by and under the statutes and consequent deeds, should be transferred to and vested in the lessees, to be held and exercised in [338] name of the lessees, in the same manner and to the same extent and effect as if the undertaking authorised to be made and maintained had been originally authorised to the lessees under the statutes and consequent deeds. 6th, But the subjects, and all the powers, rights, and privileges leased, shall be subject to the existing agreements and liabilities previously affecting them. And 7th, The rent should simply consist of a specific sum, payable annually, and have no connection with or relation to dividends or a participation of profits.

Saving
clause as to
General
Railway
Acts.

There may be inserted a provision that the force and operation of the General Railway Acts shall not be impaired by the special statute. The Act 1 and 2 Vict. c. 98 (14th August 1838), being "an Act to provide for the conveyance of the mails by railways," provides, in section fourteenth, that when a railway has been leased previous to the date of the Act, the lessees shall be bound by its provisions; but so that the lessees may be as individuals, and not as a body corporate, shall be limited as to their liabilities; and the interpretation clause, sec. 19, enacts that the terms "Company of

¹ The inclusion of the movable articles under the contract of lease must be attended with practical difficulties, and therefore the preferable course is

absolutely to assign them for a consideration, either *in cumulo* or payable annually, and so practically merging in the rent.

Proprietors," or "Railway Company," or "Company," shall include lessees. The 3 and 4 Vict. c. 97 (10th August 1840), being "an Act for regulating Railways," and the 5 and 6 Vict. c. 55 (30th July 1842), being, "an Act for the better regulation of Railways and for the conveyance of Troops," bear in their respective interpretation clauses (section twenty-one of each) that "Company" shall include lessees. The 7 and 8 Vict. c. 85 (9th August 1844), section sixth, enacts that daily cheap trains (parliamentary) shall be provided by the lessees of railways. The 9 and 10 Vict. c. 57 (18th August 1846), being "an Act for regulating the gauge of railways," provides, by section sixth, that where a railway is leased, the company having the control of the works shall be liable for penalties incurred by an infringement of the statute; and by the 14 and 15 Vict. c. 64 (7th August 1851), the Act constituting railway commissioners is repealed, and the powers vested in Commissioners of Railways are transferred to the Board of Trade.

Decisions are contained in the Books of Reports of the Scotch Courts, in which mention of leases of railway is so made as at first sight to indicate that matter relative to such leases, or at least illustrative of their nature, might be elicited, but upon a close examination, this (it may be deemed) will be found to be erroneous.¹ The number of decisions which it is necessary to note becomes thus very small.

1. The most important decision is one in which it was held by the Court of Session that there was a lease of a railway, that it involved [339] the usual characteristics of the contract, and that the lessors were liable for all the ordinary prestations of landlords or owners, and the lessees for those of tenants. The question arose relative to the interpretation of the term "owners" under the 8 and 9 Vict. c. 83, being the Poor-Law Act. The Barrhead Railway Company was authorised by Act of Parliament to lease their line to the Caledonian Company for nine hundred and ninety-nine years, on payment of a certain dividend as "rent" to the shareholders. It was declared that the lease should take effect at a certain date. The Caledonian Company having for some time delayed to implement the lease, the Barrhead Company remained in possession of the line of railway, and were assessed for the poor both as owners and occupiers. It was held—1st, That the Barrhead Company were primarily liable for the assessment by reason of occupancy, but with relief against the Caledonian Company; 2d, That on a sound interpretation of the statute, the Barrhead Company remained

Decisions.

Glasgow,
Barrhead,
&c., Ry.
Company
v. Cale-
donian Rail-
way Com-
pany and
Abbey
Parish of
Paisley.

¹ Examples of such decisions are 10 D. 215, 20 Jur. 58. Hunter v. N. B. Ry. Co. 13 Nov. 1849, 12 D. 37. those in London and N.-W. Ry. Co. v. Scottish Central Ry. Co., 4 Dec. 1847,

owners of the line, notwithstanding the long duration of the lease, and were therefore assessable by reason of ownership; and 3d, That the assessment was properly calculated on the amount of the dividends stipulated as rent, and not upon the diminished rental sanctioned to be taken for the year in question by an Act of Parliament passed subsequently to the imposition of the assessment for that year.¹

Id. — contd. The opinions of the majority of the Judges were founded on the position that the deed executed by the B. Company was the contract of lease according to the usual form. The primary object of the statute was to empower the B. Company to grant a lease to the C. Company. Accordingly, by the lease executed they, in consideration of the rents or dividend specified, "have set, and by these presents, in tack and in assedation let to the said C. Company, for the space of nine hundred and ninety-nine years, the railway and other subjects above specified." The rights and liabilities, it was declared, were to subsist "during the continuance of the lease." Although the administrative powers of the B. Company, as vested with the feudal property of the soil and its adjuncts, were limited, they were not extinguished by the beneficial use and possession having been transferred by the leasing contract to another company; the position in law was not weakened, but strengthened, by the contract being a statutory lease, for the express object of the Legislature was to sanction that well-known form of contract. And while the powers and liabilities might vary from those inserted in ordinary leases, the nature of the contract could not thereby be subverted.² The opinion of the minority of the [340] Judges was, that although, as respected the railway and works, a lease was to be granted for nine hundred and ninety-nine years, yet that the substantial provision is a total transference of the property, powers, and liabilities of the B. Company being divested and liberated, and the C. Company invested and subjected, whereby the latter became the owners, which construction was strengthened by the equivalent being an annual dividend out of profits. The technical phraseology borrowed from the ordinary contract of lease was therefore to be deemed nominal, and as no wise derogating from the essence and substance of the statutory deed.

Reversed
in House of
Lords.

This decision was reversed on appeal.¹ In the House of Lords the question for determination was stated to be, which of the rail-

¹ Glasgow, Barrhead, and Neilston Ry. Co. v. Caledonian Ry. Co. and Abbey Parish of Paisley, 30 July 1865, 17 D. 1148, 27 Jur. 588.

² Note of the Lord Ordinary (Ander-

son), which embodies an able and condensed exposition of the views adopted by the majority of the Judges.

³ [10 Feb. 1860, 22 D. (H.L.) 1, 32 Jur. 292.]

way companies were liable to be assessed as owners under the Statute 8 and 9 Vict. c. 83, sec. 34. The C. Railway Company was held to be liable. It was said by Lord Campbell, C., "that the word lease is used and the word 'rent' is used although the payment is sometimes called a fixed dividend, but *tota re perspecta*, we must consider in what sense the words are used by the parties, and what operation was meant to be given to them. Now, I think that instead of this deed operating as a lease, the intention of the parties was to convey the line to the C. Company, and that the C. Company should have all the rights and be subject to all the liabilities of owners. The common law of Scotland knows no such estate or interest as that which was to vest in the C. Company; and on the other hand, the payments to be made for the benefit of the shareholders in the B. Company have by no means the legal incidents of rent. But the Legislature sanctioned an arrangement between the two companies, by which, in consideration of certain periodical payments, the ownership of the B. line was transferred to the C. Company for nine hundred and ninety-nine years."

The more important of the reasons of the judgment are—1st, ^{Reasons of the judgment.} The extraordinary duration; 2d, That the B. Railway Company continued to be a corporation; 3d, That what was called sometimes "rent" and sometimes a "dividend" was exigible by every proprietor of the B. Railway Company (who had paid a certain sum per share) out of the general funds or profits of the C. Railway Company; 4th, That a lien on the B. line is given to the shareholders to secure to them the payment of their dividends; 5th, That these dividends were paid to the treasurer of the B. Railway Company, who was to distribute them; 6th, That the debts and liabilities of the B. Company were to remain effective, and might be enforced against the C. Company; 7th, That from the date of the deed the C. Company was to be put in the situation in all respects of the B. Company, and that there was to be identity [341] for a thousand years save one.

In addition to these reasons emerging out of the deed itself, there was another reason arising out of a separate transaction. By a local Act subsequently passed (the 14 and 15 Vict. c. 134), called "The Caledonian Railway Arrangements Act, 1851," four branch railways mentioned had been purchased by, transferred to, and amalgamated with the C. Company, and in consideration of such transfers the shareholders in the companies whose lines were so transferred were to receive, one of them a perpetual annuity equal to a certain percentage on the capital stock transferred, and the others fixed dividends on their shares at various specified rates, to

be paid to their respective shareholders by the C. Company. The statute then recited the B. Leasing Act, and bore that the original shareholders of the B. Company were entitled to dividends of a certain percentage, with contingent increase on the original shares, and that the new shareholders were entitled to a certain fixed dividend or certain percentage on their shares, all payable out of the general funds or profits of the C. Company. The statute then bore that the annuities and guaranteed dividends are payable by the C. Company to the parties respectively entitled to them by virtue of the five Acts, and provision was made for their security by a lien over the railways transferred and upon the whole revenues. By that statute the dividends or payments were all treated as making up one annual sum, payable by the C. Company in perpetuity, and the B. line were referred to as a line authorised to be transferred, not demised, to the C. Company. The inference was that the legal obligation of the C. Company, with regard to the several lines vested in them, was in every case the same, and that if they were owners, as they certainly were, of the four lines of railway lately transferred to them, so they were also owners of that which was leased to them for nine hundred and ninety-nine years, except that at the end of that term their right as owners would revert to the B. Company, while in the meantime the line was authorised to be transferred, and the lease executed was treated as a transfer.¹

*Stirling and
Dunfermline
Railway
Company
v. Edin-
burgh and
Glasgow
Railway
Company.*

2. The statute which incorporated the Stirling and Dunfermline Railway Company provided that the Edinburgh and Glasgow Company should take a lease of their works, pay a certain percentage on the amount which had been expended, and on completing the works, as the said amount [342] should be ascertained and fixed by an engineer named in the Act. The S. and D. Company raised an action to compel the E. and G. Company to take up the lease, to ascertain the expenditure, and to pay the rent. The Court held them entitled to have decree, and a visit of the engineer named to ascertain and fix the amount. The result having been reported by him to the Court, the E. and G. Company stated objections to his report, and craved to have it opened up; but it was held that he was not a mere reporter acting under the authority of the Court, but a statutory referee, and that his report was final, and could not be subjected to examination.²

¹ Per Lord Campbell (Lord Chanc.) and Lords Cranworth and Chelmsford. The two latter relied greatly on the tenor and results of the "Arrangement Act." Lord Brougham said that he concurred in the opinion of Lord Wood as to the effect of the transference of the

one company to the other in the form in which it was made.

² *Stirling and Dunfermline Ry. Co. v. Edin. and Glasgow Ry. Co.*, 11 July 1856, 18 D. 1230, 25 Jur. 619; [4 March 1857, 19 D. 598, 29 Jur. 277.]

3. A railway company having, in terms of an agreement, executed a lease and deed of assignment of their line in favour of another company, who afterwards refused to take possession of the line, it was held that an application to the Court by the lessors for the appointment of a judicial factor to manage their railway was incompetent.¹ The doctrine laid down was that while the Court were not prepared to say that "they could not appoint a manager without sequestration," they would not sequester a railway while the company, its lawful owners, were in active occupation.

4. An Act proceeding on the preamble that the one party was willing to lease the contemplated line and the other to take it on lease, gave power to the parties to enter into a lease upon such terms as should be agreed on. An action having been raised to compel execution and delivery of a lease, it was held that it was open to either party to resile from the proposed lease.²

5. A case may be noted which bears on the subject, while it presents no doctrine or rule of law. A railway company by an informal missive granted a lease of their line in perpetuity to another company. The lessees entered into possession and commenced working the line. Afterwards an Act of Parliament was passed, by which it was provided that the line should, on the execution of a conveyance, be vested in and belong to the lessees for their absolute benefit, subject to a lien in favour of the original proprietors in security of an annuity of eight per cent. on their capital stock payable to them by the lessees "in consideration of the transfer by this Act effected." Provision was also made that should the annuity fall into arrear, the original proprietors might apply for a judicial factor in terms of the Lands Clauses Consolidation Act, secs. 56 and 57. No conveyance was [343] executed in terms of this provision. In an application by the original proprietors for the appointment of a judicial factor, the Court held that notwithstanding the conveyance had never been executed, the possession was to be ascribed to the statute and not to the informal missive. They ordered the conveyance to be forthwith executed at the sight of the Clerk of Court, and appointed a judicial factor to enter upon his office, provided the arrear due the petitioners was not paid on the execution of the conveyance.³

¹ Glasgow, Barrhead, and Neilston Ry. Co. v. Caledonian Ry. Co., 13 June 1850, 12 D. 1014, 22 Jur. 419.

² Monklands Ry. Co. v. Glasgow, Airdrie, and Monklands Junction Ry. Co., 14 July 1849, 11 D. 1395, 22 Jur. 523.

³ Glasgow, Garnkirk, and Coatbridge

Ry. Co. v. Caledonian Ry., 10 June 1850, 12 D. 989, 22 Jur. 437. [The following cases as to leases of railways may be noted—Wedderburn v. Scottish Central Ry. Co., 17 July 1848, 10 D. 1317, 20 Jur. 431. Monklands Ry. Co. v. Glasgow and Monklands Junction Ry. Co., 14 July 1849, 11 D. 1395, 21

Barrhead
Railway
Company v.
Caledonian
Railway
Company.

Monklands
Railway
Company v.
Glasgow,
Airdrie, &c.,
Railway
Company.

Glasgow,
Garnkirk,
&c., Rail-
way Com-
pany v.
Caledonian
Railway
Company.

CHAPTER XVIII

BOWING CONTRACT.

Bowling of
cows.

In some parts of Scotland (chiefly Ayrshire, Lanarkshire, Kirkcudbright and Caithness) there is a contract of location which is popularly known by the rather singular name of the "Bowling of Cows." A proprietor or principal tenant, who is the owner of a stock of cows, lets them, with the privilege of grazing them on the farm, to a party who is called a "bower." A certain sum is paid annually by the bower, who replaces it, together with a fair profit, by the sale of the dairy produce. In some instances the "bowling" is extensive, and the consideration high. A separate house and offices are sometimes granted to the "bower," with other privileges, [344] as the right of having his produce conveyed to market by the carts of the proprietor or principal tenant, [and the right to certain supplies of turnips, hay, cut grass, and other food for cattle.] The particular fields let to him are specified. The proprietor, or principal tenant, may in some cases resume one of them for ploughing, giving the bower another of equal value; but in all cases the bower has the permanent and exclusive right of possession. All the public and parochial burdens are paid by the proprietor or principal tenant. There are, it is understood, variations in the details; but these or similar provisions form the substantial characteristics of the contract, which is frequently in writing.¹

Goldie v.
Oswald.

Only one case, and that comparatively recent, is to be found in the reports relative to this contract.² The tenant of a dairy farm entered into a contract of bowling. He was sequestered for rent, in the petition for which it was craved that the bower might be interdicted from carrying away certain produce, including cheeses. Under proceedings for alleged breach of sequestration, the bower was ordained to consign the proceeds of certain of the cheeses, and to restore the remainder. Having failed to obey, warrant for his imprisonment was granted, and he brought a suspension of the interlocutor and warrant. It was argued, on the one part, that the

Jur. 823. Stewart v. Blackburn, 5 March 1850, 12 D. 834, 22 Jur. 365. Finnie v. G. and S.-W. Ry. Co., 10 March 1853, 15 D. 523, 25 Jur. 301, 3 Stuart 105. Edin. and Glasgow Ry. Co. v. Milling and Dunfermline Ry. Co., 11 March 1853, 14 D. 747; H. L. 6 July

1853, 15 D. (H. L.) 48, 25 Jur. 508, 2 Stuart 91.]

¹ Cay's Analysis of the Scottish Reform Act, part ii. pp. 314-16, sec. 252-3; Notes of Decisions of the Appeal Court of Inverness, p. 5.

² Goldie v. Oswald and Kennedy, 25 Jan. 1839, 1 D. 426.

contract was not properly that of subtenancy, but rather that of sale of a certain quantity of farm produce. On the other part, it was maintained that the bower possessed as a subtenant, but that even assuming him to be not properly a subtenant, the cheeses were equally subject to the landlord's hypothec. Lord Jeffrey ^{Bower's cheeses sub-} (Ordinary) held that the order to consign and restore was good, ^{ject to land- and the Court affirmed the judgment. It was said by the Lord ^{lord's hypothec, Ordinary that it might apparently be safely inferred that the bower was a subtenant, from his occupying for a rent certain of the farm offices and the grazing of several specific fields; but if the property of the cattle be considered as still in the principal tenant, the bargain would resolve itself into a personal arrangement by which the bower undertook to manage, insuring him a certain fixed profit and appropriating the residue; and that whether he was a subtenant or manager, the landlord's hypothec was equally as clearly available. The doctrine therefore was not laid down that the agreement of bowing constitutes the contract of sublease. Nor is any such doctrine indicated in the opinions delivered by the Court.¹}}

A doubt may well exist whether this contract can, in strictness, ^{Whether} [345] be deemed that of lease or sublease. Where the proprietor or principal tenant retains the right of removing the bower from any of the fields, the right appears to be merely that of grazing the cows over the farm generally, and consequently there is no specific and exclusive right conveyed to any portion of the land. Where the particular fields are specified from which the bower cannot be removed, and from which he is entitled to exclude the proprietor or principal tenant, the contract approaches more nearly to that of lease or sublease. But even then the restricted nature of the use of the land, the necessary occupation with the stock of the proprietor or principal tenant, and the *cumulo* payment for the use of the land and stock, appear to render the bower rather a manager of that stock, paying a part of the produce to the owner of it, and himself retaining a part, than a holder by lease or sublease, conformably to the legal qualities which have always been deemed characteristic of those contracts. The local opinion (it is understood) is that a bower is a manager merely.

¹ In the marginal abstract of the report, and also in a foot-note, it is said that the contract is that of sublease.

Although such is the leaning of the opinion of the Lord Ordinary, it is not laid down by him.

BOOK III.

CONSTITUTION OF THE CONTRACT OF LEASE.

As the parties to the contract of lease and its subject-matter have now been ascertained, the next object of investigation is the constitution of that contract, or, in other words, the development of those qualities by which it is rendered capable of producing those mutual rights and duties through the operation of which it becomes beneficial to the contracting parties.

CHAPTER I.

GENERAL DOCTRINE OF CONSTITUTION.

Personal
right under
contract of
lease.

A lease is in its nature a contract purely personal, perfected by the consent of parties vesting each with the right of compelling the other and his representatives to perform, but not operative against those claiming through an independent title.¹ In some countries it retained this original constitution, while in others it has, by the increase of civilisation and capital, been gradually converted into a real right, protecting the lessee against eviction.

Comparative
jurisprudence.

By the law of Rome it was perfected by consent alone without writing, and it gave the *actio locati conducti*, by which the lessee was entitled to compel implement from the lessor and his heirs, but he was not protected against singular successors,² for the

¹ Dirl. and Stau. 411-12; 1 Stair, xiv. 4, 2 Stair, ix. 1 and 4, and 3 Stair, ii. 6; Mackenzie's Obs. 37-8; 2 Bankt. ix. 1; 2 Ersk. vi. 23; 2 Ross' Lect. 456; 1 Bell's Com. 66; Bell's Pr. 1186; 1 Jurid. Styl. 4th edit. 454.

² Inst. l. iii. t. xxv.; Dig. l. xix. t. ii. l. 1, 2, 32; Cod. l. iv. t. lxx. l. 9; Hein. ad Inst. l. iii. t. xxv.; Vinn. ad Inst. l. iii. t. xxv. Hein. ad Pandec. l. xix. t. ii. sec. 1 and 17.

brocard was "*Emptorem quidem fundi necesse non est stare coloni, qui prior dominus locavit.*"¹ The rule of the law of Spain is that it is completed by consent, and that if the thing rented be sold within the term, the lessee ought to give it up; but the vendor is obliged to make good to him a share of the price proportioned to the time [347] that remains to complete the term unless it shall have been otherwise covenanted, or the lease shall have been granted for the life of either the lessee or lessor perpetually.² In Holland the rule with relation to the obligatory effect appears to have varied at different times and in different provinces.³ The existing maxim is, that by the sale of the thing let the lease does not become void,⁴ but that writing is indispensable.⁵ The law of France, likewise, seems to have varied. Pothier lays down the doctrine that a lease is not binding upon a singular successor, even although it has been passed by an act before a notary.⁶ But by the Code Civile the rule is that if the lessor sell the thing hired the purchaser cannot expel the farmer or the tenant who has an authentic lease the date of which is certain, unless the lessor has reserved such a right by the lease.⁷ Conformably to the law of England, a covenant for quiet enjoyment against all claiming by a title under the lessor, and consequently against an heir or purchaser, is implied in leases,⁸ although not in writing, for a license to inhabit amounts to a lease;⁹ and a beneficial license to be exercised upon land may be granted without deed and without writing.¹⁰

By the law of Scotland a lease is in its own nature a personal contract, obligatory upon the parties and their representatives, but not obligatory upon singular successors, unless certain requisites be complied with prescribed by a special statute, by which there is engrafted a real right upon the personal obligation.¹¹

¹ Cod. *ut sup.*

² Inst. of Spain, by Del Rio et Rodriguez, translated by Johnston, b. ii. t. xiv. pp. 225-6.

³ Voet *ut sup.*, s. 17.

⁴ Inst. of Laws of Holland, by Van Der Linden, translated by Henry, b. i. ch. xv. s. 12, p. 240, and De Groot, Inleid. 3, b. xix. D. n. 59, there cited.

⁵ Vinn. *ut sup.*; Voet *ut sup.* s. 2; Van der Linden, *ut sup.* 237; Ord. Van't Zegel of 11th Sept. 1794, art. 61, et Plac. van Keizer Karel of 22d Jan. 1816; Pol. Ordonn. art. 31, Plac. 26th Sept. 1658 et 24th Feb. 1696, there cited; Van Leeuwen, b. iv. c. xxi. p. 401.

⁶ Traité du Contrat de Louage, par Pothier, pp. 156-7.

⁷ Code Napoleon, b. iii. t. viii. N. 1743.

⁸ Woodfall's Law of Landlord and Tenant, p. 363.

⁹ Woodf. p. 2. Right ex d. Green v. Proctor, 4 Burr. 2209. Hall v. Sealwright, 1 Mod. 14; Anon. 11 Mod. 42.

¹⁰ Woodf. p. 3. Taylor v. Waters, 7 Taunt. 374.

¹¹ 1449, c. 17; 2 Craig, x. 9-11; Dir. and Steu. 411-12; 1 Stair, xv. 4, 2 Stair, ix, 1, 2, 4 and 6, 3 Stair, ii. 6; Mackenzie's Obs. 37-9; 2 Mackenzie's Inst. vi. 6; 2 Bankt. ix. i; 2 Ersk. vi. 23 and 30; 2 Ross' Lect. 473-6; 1 Bell's Com. 65-6; Bell's Pr. 1186; 2 Stair, ix. Note a (by Brodie), No. ii.; 1 Jurid. Styl. 4th edit. p. 456 *et seq.*

In accordance with its natural constitution the lease shall be examined *first* as a personal, and *second* as a real right.

CHAPTER II

CONSTITUTION OF LEASE AS A PERSONAL RIGHT.

Personal
contract of
location.

[348] As a lease (conformably to doctrine already stated) is in itself merely a personal contract of location, it is perfected by the mutual consent of the lessor and the lessee, the former agreeing to give the use of the subject let, and the latter to make a return.¹ The title consists of this personal contract, upon the terms of which the existence, duration, and value of the right depend.² In its more simple state, consequently, there is not any specific mode or form according to which a lease must be constituted. Whether the consent be verbal or written, formal or informal, its existence will when proved create an obligation upon the parties for a certain period, the duration of which the law has defined. Although by statute leases of certain subjects are created real rights when certain requisites are complied with, yet leases of those subjects may in certain cases be valid as personal obligations although those requisites be not complied with. As leases of certain other subjects are not included under the statute, no right to them other than a personal right can be acquired.

Obligation
to grant a
lease.

In conformity with these rules a paction or a promise to make a lease is of equal validity with a lease itself.³ But a verbal "communion" is not obligatory till it be reduced into writing if the parties have agreed that it shall so be done.⁴

Earnest or
Arles.

In towns where leases are generally verbal, and from year to year, *arrhæ*—in common parlance earnest or arles—are often given

¹ Authorities in note immediately preceding, and *Yeoman v. Elliot* and *Foster*, 2 Feb. 1813, F.C. 149.

² *Per* Lord Fullerton in *Brock v. Cabell*, 5 March 1830, F.C. 504, 8 S. 661, 2 D. and A. 346.

³ 2 Craig, x. 10; 2 Stair, ix. 6; 2 Bankt. ix. 5; 2 Ersk. vi. 21. *Charteris v. Macduff*, 1667, Mor. 8937. *Fraser v. Leslie*, 1881, Mor. 12,405. *L. Monteith v. Tenants*, 1683, Mor. 8397. *Binning v. Douglas*, 1592, Mor. 12,406, noticed

in Note to *Fraser v. Leslie*, *ut sup.* *Baillie v. Somerville*, 1611, Mor. 8398. *Low v. Lyall*, 1611, Mor. 8398. *Johnston v. Logan*, 1621, Mor. 8399. *L. Affleck v. Mathie*, 1629, Mor. 5409. *Lawrie v. Keir or Ker*, 1630, Mor. 12,736, 15,169. *Jackson v. Grahame*, 1706, Mor. 12,413. *Lord Braco v. Innes*, 1742, Mor. 15,176.

⁴ *Tait's Justice of Peace*, 384. *Power v. the Customars*, 1626, Mor. 8399.

and accepted in token of the completion of the contract. In consequence there is then no *locus penitentiae*. Thus a party took a lease [349] of a shop and a house in December for the year from the ensuing Whitsunday, gave "arles," and found caution for the rent. In February she removed from the house which she then occupied, with all her effects, and went to England. The proprioritor thereupon let the house and shop to another, and the original lessee, having returned before Whitsunday, was excluded by the new lessee. It was held that the contract of the lease was constituted, and that the lessor "was not warranted in granting the new lease."¹ But this rule may be effected by local usage. When a house in Edinburgh had been taken in March, to be entered to at Whitsunday, and "earnest" given, but the lessee gave it up more than forty days before Whitsunday, it was decided that he was entitled to resile in consequence of a local custom by which such "overgivings" were sustained as legal, whereby all the penalty was the loss of the earnest, although the Court deemed that this custom was an evident hardship upon landlords."² But where in the same burgh a lease was taken only fourteen days before the term, and "overgiven" within forty-eight hours after it was taken, the "overgiving" was not sustained, while it was held sufficient to entitle the lessee to resile that after the "overgiving" the house was let to another and earnest taken.³

CHAPTER III.

VERBAL LEASE.

SECTION I.—CONSTITUTION OF VERBAL LEASE.

When a verbal lease is constituted by "words," in the literal acceptance of the term, although accompanied by giving earnest, the class of obligations among which it is to be ranked is evident. But even if the tenor of the verbal agreement be committed to writing, it will retain its verbal character if the nature of the transaction be such as to establish that it was not done under the contemplation of creating a written obligation. Where, therefore, in the course of proving a judicial rental, a lessee made oath that

Verbal
lease may be
proved by
writing.

¹ Topping v. Barr, 1830, 8 S. 973, 3 D. and A. 182.

² Watt v. Stewart, 1703, Mor. 8472.

³ Kerr v. Downie, 1670, Mor. 8470.

he possessed certain lands by virtue of a verbal agreement with the proprietors, for a specific rent and for a definite period, which oath he subscribed, it was held that, as the agreement could only be binding for one year, the lessee, by setting forth the terms of the [350] verbal agreement in the oath, which was taken down in writing, could not invert the nature of that agreement, or create any stronger obligation against the proprietor than what the verbal agreement imported.¹ The doctrine thus established was, that the written oath was merely evidence of the verbal lease, and not equivalent to a written lease. On the same principle, it was decided that a discharge by a factor (not empowered to grant leases), bearing to be for the additional rent as per the new agreement made with the landlord, constituted only a verbal agreement, and was not binding for a term of years upon the landlord.²

Renewal of
verbal lease
with new
stipulations
by notice
and implied
assent.

Where a tenant possesses on a verbal lease from year to year, if the landlord intimate to him new stipulations, as with relation to possession, or away-going crop, or amount of rent, and that if he have objections he must state them within a given time, the doctrine that the former agreement will be held to subsist unless new stipulations be expressly agreed to was overruled, and it was held that it is incumbent on the tenant, if he do not agree to the new stipulations, to state his objections within the time specified, and that if he do not he will be held to have consented to a new lease or agreement, and interdict will be granted against proceedings by him in the occupation of his farm as under the original lease.³ This decision involves the doctrine of the constitution of a lease embodying special stipulations, not by express words, but by implication. The doctrine may be sanctioned by equity, and perhaps it ought to be law; but it may be doubted whether it is conformable to any existing maxim of law or to authority.

SECTION II.—DURATION OF VERBAL LEASE.

The valid duration of a verbal lease is limited to one year.⁴ If

¹ 2 Ersk. vi. 30, Note. 2 Stair, ix. Note a (by Brodie), No. 2. Stewart v. Leith, 1766, Mor. 15,178, Hailes 174.

² Campbell v. Robertson, n. r., noticed in 1 Bell on Leases, 310-11.

³ Morrison and McCallum v. Campbell, 22 June 1842, 4 D. 1426, 14 Jur. 518.

⁴ 2 Craig, x. 10; 2 Stair, ix. 4; 2 Mackenzie's Inst. vi. 5; 1 Bankt. xi. 23, and 2 Bankt. ix. 5; 2 Ersk. vi. 30, and 3 Ersk. ii. 2; Bell's Pr. 1888;

More's Notes, ccxlv.; Tait on Evid. 222-3 and 231-2; Tait's Jus. of Peace, 384; 2 Stair, ix. Note a (by Brodie), No. 2; 1 Jurid. Styl. 3d edit. 666. Charteris v. McDuff, Fraser v. Leslie, Lord Monteith v. Tenants, Binning v. Douglas, Baillie v. Somerville, Low v. Lyell, Johnston v. Logan, L. Affleck v. Mathie, Jackson v. Graham, Lord Bracco v. Innes, *ut sup.* chap. ii. of this book, p. 362, Cadell, 3 June 1749, Kilik. (Process).

a verbal lease or paction be made for a period longer than one year, and there has not been possession, it has been said that it would not be binding even for one year, because the terms and conditions must have been adjusted at the commencement of a course of years and would probably be quite unsuitable to a shorter period; and [351] the allowing such an agreement to be binding for one year would be to convert one transaction into another.¹ This doctrine is apparently correct, where either the lessor or lessee is attempting to enforce implement of a verbal lease for more years than one upon which lease possession has not followed, and matters are entire.² Where, however, the lessee has entered into possession under a verbal lease for a series of years, the lease will be obligatory upon both parties for one year, and the lessee must pay the stipulated rent.³ But even although there has been possession and rent paid, a verbal lease for a term of years is binding for one year only, and either party is entitled to resile at the end of each successive year.⁴ In an old case it was held that a lessee under a verbal lease for five years, having possession for three years, could not renounce for the other two.⁵ But the doctrine of that case has long since been overruled, and the law has been settled as already stated.

But as this limitation depends upon the rule that contracts relative to heritage must be in writing, it includes only land and its adjuncts, as houses, mills, mines, fishings, woods, or in other words, those subjects to which the Statute 1449, c. 17 (hereafter detailed), has been deemed to be applicable.⁶ Leases of rents,⁷ of game,⁸ and of services prestable by tenants,⁹ to which the statute does not apply, are therefore saved from its operation. For the same reason, leases of feu-duties, customs, or similar subjects, are not included. In a comparatively recent case it was argued that burgh duties or customs might be validly let for two years by a verbal lease, because they did not fall under the general rule appli-

Verbal lease of lands and heritages valid only for one year.

Some verbal leases valid for terms of years.

¹ Tait on Evid. 222; Tait's Justice of Peace, 384.

² 1 Bell on Leases, Note y, pp. 281-3.

³ Tait on Evid. 231-2; Bell on Leases, *ut sup.* [See Fowle v. McLean, 18 Jan. 1865, 6 Macph. 254.]

⁴ 2 Stair, ix. 4; 2 Bankt. ix. 5; 2 Ersk. vi. 30, and 3 Ersk. ii. 2; 1 Bell's Com. 388, and Note 4; 1 Bell on Leases, 281-5, Note y, and Note b, 285. Edmonston v. Edmonston, 1668, Mor. 12,418. Keith v. Johnston's Tenants, or Mowat v. Johnston, 1836, Mor. 8400, 18,170. Skeen v. —, 1637, Mor. 8401. Paterson v. Burton, 1711, 4 B. S. 830. Mackenzie and Wylie v. Trotter,

1729, Mor. 8437. Lord Braco v. Innes, *ut sup.* Stewart v. Leith, *ut sup.*

Buchanan v. Band, 1773, Mor. 8478. A v. B, 1781, Mor. 15,181. Neill v. Cassillis, 22 Nov. 1810, F.C. 40.

⁶ A v. B, 1629, Mor. 8400.

⁷ Mackenzie's Obs. 37; 2 Bankt. ix. 1; 2 Ersk. vi. 27; 2 Ross' Lect. 27; 1 Bell's Com. 65.

⁸ Bankt. and Ersk. *ut sup.*; 2 Ross' Lect. 507; 1 Bell's Com. 767.

⁹ Pollock, Gilmour, & Co. v. Harvey, 5 June 1828, F.C. 968, 6 S. 913. [See below, Note p. 437, 3d ed.]

⁵ Gordon v. L. Forbes, 1774. Mor. 15,221.

cable to heritable property, from which it was inferred that the duty-house, being merely an accessory to the duties, might also be let in a similar manner for a similar period. The doctrine with relation to the duties themselves does not seem to have been disputed, but with relation to the duty-house a bill of suspension was passed in order that the [352] question might be tried.¹ When the case came again before the Court the decision was, that a house within burgh, let as accessory to certain burgh customs, but not used for the purpose of collection, having been sublet, as was alleged, with part of the customs, it was competent to remove the subtenant from the house as a separate tenement, and according to forms of warning in use as to other houses within burgh;² and it was said that, as to the argument that the suspenders were not tenants of the duty-house separately, the suspension set forth that they were subtenants of it, and the Court could not listen to the plea that it was only held by them as accessory to the duties.³ No decision therefore was given upon the general question, whether property in its own nature within the rule is excepted if let as an accessory to property without the rule. According neither to principle nor analogy does there seem to be reason for such an exclusion. Although used for the purpose of collection, and of inferior value, heritable property is not an accessory, because in law it is regarded as of a different nature, and as *jus nobilius*. A house let along with shooting ground, although an accessory in fact, would unquestionably not be so deemed in law as to exclude it from the operation of the rule applicable to heritable property.

SECTION III.—MODE OF PROVING VERBAL LEASE.

Verbal lease
for one year
may be
proved by
witnesses.

Evidence by witnesses of a verbal lease for one year is competent.⁴ In one case it was decided that such a lease could not be so proved "because it was a promise," and where the contrary was found it was only in this sense, "that the duty of a year's tack may be proved by witnesses when the tacksman enters to possession."⁵

¹ Greig, &c. v. Boyd and Latta, 1827, 6 S. 350.

² Scott v. Boyd and Latta, 1829, 2 D. and A. 207, 7 S. 592.

³ Per Lord J.-C. Boyle, 7 S. 593.

⁴ 1 Bell on Leases, Note y, pp. 281-2; Bell's Pr. 1187; More's Notes, ccxlv.; Tait on Evid. 307, and Note 2; Tait's Justice of Peace, 384. Charteris v. M'Duff, Fraser v. Leslie, Lord Monteith

v. Tenants, Binning v. Douglas, Baillie v. Somerville, Low v. Lyell, Johnston v. Logan, L. Affleck v. Mathie, Jackson v. Grahame, *ut sup.*

⁵ Lord Pitaligo v. Paton, 1678, Mor. 12,410. In a note it is said that a similar decision was pronounced in Bruce v. Bruce, 1628, Mor. 3609-10, but on examination the point does not appear to have arisen in that case.

But this decision seems to be unsound, because, 1st, The doctrine, as laid down in the Books is, that a verbal lease is perfected by consent alone, or that the paction or promise *per se* is sufficient to bar the parties from resiling.¹ 2d, The preceding decisions do not admit of the construction there put upon them, as although in [353 several of them there had been possession, the *rationes decidendi* consist of the general rule that a verbal lease or a promise of one for a year might be proved by witnesses. 3d, In a subsequent case it was held that a simple tack or set of lands, either in town or country for a year, might be proved by witnesses.² And 4th, In that class of cases (to be immediately noticed) in which it was ruled that parole evidence of a lease for more than one year was incompetent, the general doctrine of its admissibility as applicable to one year appears to have been assumed.

A question of difficulty has been raised, but cannot be deemed to have been determined, whether in a lease for one year, if there be a written document, it is competent to exclude the document and rely solely on parole evidence. The question first emerged where it was pleaded that a missive of lease, though unstamped, to which the subsequent possession was conformable, excluded parole proof for the terms of the agreement. But a decision of the question was not deemed to be necessary.³ In a subsequent case where the question was raised, there was a missive. It was pleaded that the lease had been completed by the verbal bargain between the parties, and being only for one year, the contract and the various stipulations connected with it might competently be proved by parole, and that the case was not altered by the circumstance of the parties having made a memorandum of its terms. But it was held that the parties, although they might have stood, had they chosen, upon the verbal agreement, had reduced it into writing and signed it before witnesses; and therefore it was not a mere memorandum, but rather a regular written lease; and consequently it was held that it embodied the contract, and that parole evidence was to be excluded.⁴ An action of damages was raised at the instance of the tenant against the occupier of a conterminous subject for illegally taking possession of part of the pursuer's tene-

Question—
whether
where
writing ex-
ists, parole
evidence of
a verbal
lease is
admissible.

¹ 2 Craig, x. 10; 2 Stair, ix. 4; 2 Ersk. vi. 30, and 2 Ersk. ii. 2.

² Jackson v. Grahame, *ut sup.*

³ Harrold v. Pollerfen, 4 June 1844, 6 D. 1103.

⁴ Spencer, Sutherland, & Co. v. Hay, 12 Dec. 1845, 8 D. 283, 18 Jur. 133. It was said (*per Lord Moncreiff*) "I cannot see that the situation of the party seeking

to prove the lease by parole is to be made worse because the parties had made a note of its terms at the time. The missive which they have drawn out is more formal than many that have been sustained when followed by *rei interventus*." In the actual case there was *rei interventus*—of which in its proper place.

ment. Writings, it appeared, had annually passed between the pursuer and his landlord, in terms of which the pursuer was continued in possession from year to year. Those writings consisted generally of an inquiry by the landlord whether the tenant intended to continue his occupation, with an answer by the tenant in the affirmative. The tenant attempted to prove his tenancy by parole evidence. An objection was taken that, by reason of the [354] existence of the missive letter, the pursuer could not prove his tenancy otherwise than by their production. The Lord President (Boyle) sustained the objection, ruling that, as the letters were not stamped they were inadmissible, and that, being in existence, the tenancy could not be proved without them. In judging of a bill of exceptions there was considerable difference of opinion. The Lord President explained that his ruling was rested on the ground that the letters were not stamped. He says nothing as to the admissibility of parole evidence. Such evidence was by another of the Judges deemed to be admissible.¹ The opinion of the third Judge, (Lord Cuninghame) was rested on certain technicalities relative to the issue and the pleadings, but as against the admissibility of the evidence. The case has been reported as embodying the doctrine that the tenant's occupancy could only be proved by the writings; but it may be doubted whether this can properly be deemed to have been the result.² On appeal the judgment was affirmed, for reasons which did not embody the question now examined. One of them was that the documents were unstamped. Others were technical.

The question, notwithstanding one decision, must be deemed to be open; but the doctrine there laid down is apparently sound, conformably to the rules of the law of Scotland as hitherto recognised, where writing exists, and more especially where the subject-matter of the suit relates to real property, written evidence is held to be the best, and parole secondary only; and therefore, although the latter would have been admissible if the former had not existed, yet where the former does exist the latter is to be excluded.

¹ Lord Fullerton, who said "the only point to be proved was the fact of the tenancy, and I do not see why that should not be proved *prout de jure*, even although there had been a lease. There can be no question here about the best and secondary evidence. When a fact is of such a nature as to admit of being proved either by writing or parole or a mixture of both, both of the kinds of

evidence, though differing in character, are equally good. And I see no sufficient ground for doubting that the fact of tenancy may be as well proved one way as the other."

² *Hutchinson v. Ferrier or Gordon*, 4 March 1851, 13 D. 837, 23 Jur. 379; aff. 1852, 1 Macq. 196.

³ *Spencer, Sutherland, & Co., ut sup.*

[355] If, as already indicated, the term of a verbal lease shall exceed one year, parole evidence is inadmissible.¹ In a comparatively recent case parole evidence of a lease for a year and nine months was admitted in the Inferior Court, notwithstanding an objection to the competency. In the Supreme Court, while there is no express finding that the parole proof was incompetent, it must be held to have been so by necessary implication, as in the Inferior Court it was found that the alleged agreement, not having been in writing, would not have been obligatory.²

Parole proof of a verbal lease for more than one year is inadmissible.

In the older cases a reference to the oath of the party was held to be competent. In them the questions were between the lessee and the grantor himself.³ Afterwards it was decided that the oath was not admissible in a question with a singular successor.⁴ It was therefore still competent in a question with the grantor or his heirs. But subsequently it was ruled to be incompetent, even in a question with the grantor.⁵ This case has been deemed to have fixed the law that the proof is restricted to writ.⁶ [But it is now decided that such a contract may be proved either by writ or by the oath of party on reference, to the effect of setting it up by *rei interventus*.]⁷

SECTION IV.—OPERATION OF REI INTERVENTUS UPON VERBAL LEASE.

[356] By the operation of *rei interventus* a verbal lease [entered into for a term of years and proved by writing] may acquire validity for a period longer than one year. *Rei interventus* is a doctrine qualifying the power to resile, and barring the exercise of it. It has been laid down that it is grounded on the fact of a person, otherwise imperfectly bound, having permitted another to proceed on his

¹ Authorities in Note 4, p. 364, and Note 4, p. 365, *supra*. [Gowans v. Carstairs, 18 July 1862, 24 D. 1382. Walker v. Flint, 20 Feb. 1863, 1 Macph. 417. Emslie v. Duff, 2 June 1864, 3 Macph. 854. Fowle v. M'Lean, 18 Jan. 1868, 6 Macph. 254. Campbell v. M'Lean, 20 March 1867, 5 Macph. 636; aff. 4 April 1870, 8 Macph. (H. L.) 40. Sellar v. Aiton, 26 Jan. 1876, 2 Rettie 381; comp. also Paterson v. E. of Fife, 27 Jan. 1865, 3 Macph. 423. Philip v. Cumming's Exrs., 3 June 1869, 7 Macph. 869. Forbes v. Wilson, 23 Feb. 1873, 11 Macph. 454.]

² Cowan v. Brownlee, 19 Nov. 1833, 12 S. 65.

³ Baillie v. Somerville, Low v. Lyell, Johnston v. Logan, *cit.* Lawrie v. Kerr, 1630, Mor. 12,736, 15,169. Murray v. —, 1630, Mor. 15,170.

⁴ Keith v. Johnston's Tenants, 1636, Mor. 8400, 15,170.

⁵ Lord Braco v. Innes, 1742, Mor. 15,178.

⁶ 2 Ersk. vi. 30, Note; 2 Stair, ix., Note a (by Brodie); Tait on Evid. 223. Bell, Pr. 1187, says that proof by oath is competent as against the grantor and his heirs. He must have overlooked the case of Braco v. Innes, of which he makes no mention.

⁷ [Walker v. Flint, Gowans v. Carstairs, *cit.*]

obligation or agreement as if it were complete, and to perform on the faith of it acts unequivocally referable to or resulting from the agreement, which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed.¹

Nature of
rei inter-
ventus.

In applying this doctrine to the case of leases it has been said that difficulty sometimes arises whether the act done is truly referable to the imperfect engagement—that mere possession, for example, may be ascribed to a lease for one year which is good without writing, and does not necessarily infer an intention to confirm the entire agreement, and that there must be something done to characterise the possession as under the contract, as a grassum paid, or money expended to a great amount on improvement or on building.²

Examples—
Party en-
titled to
resile.

In accordance with this rule,—1st, It has been held that the lessee was entitled to resile although the lessor had built “barns and byres” for him.³ 2d, *Locus penitentie* was found to be competent to the lessor in a verbal lease for nine years, although the lessee had, at a considerable expense, fitted up the house as a meeting-house by altering partitions and erecting pews.⁴ 3d, The doctrine has been laid down that even improvements in the way of better culture and management, if of an ordinary nature, do not form a sufficient *rei interventus* to make obligatory a verbal lease for more than one year, as of these the lessee is presumed to derive the benefit during his occupation.⁵

Party not
entitled to
resile.

E converso, it has been decided,—1st, That a grassum having been paid in contemplation of a lease for a number of years, and the lessee having died before these years had expired, his heirs had a right to possess for the remainder of the years although the lease was verbal.⁶ 2d, A verbal lease for nineteen years, where [357] the lessee had paid a grassum and expended a considerable sum upon a house and offices, was sustained, because these proceedings were referable only to a bargain for a term of years, and should not have been permitted unless that bargain were to be implemented.⁷ 3d, A lease of a field for nineteen years was sustained

¹ 1 Bell's Com. 328-9.

² 1 Bell's Com. 329, and Note 2; 1 Bankt. xi. 23; Bell's Pr. 1189, 1190; More's Notes, ccliv.; 2 Ersk. vi. 21, Note; and 3 Ersk. ii. 3, Note; Tait on Evid. 231 and 309; Tait's Jus. Peace, 384. [Fowlie v. McLean, 18 Jan. 1868, 6 Macph. 264.]

³ Skene v. —, 1637, Mor. 8461.

⁴ Mackenzie and Wylie v. Trotter, 1729, Mor. 8437.

⁵ Tait on Evid. 231; Tait's Jus. Peace, 384. Grieve v. Pringle, 1797, Mor. 5951. Macrorie v. Macwhirter and Gray, 18 Dec. 1810, F.C. 86.

⁶ Bankt., Tait on Evid., and Tait's Jus. Peace, *ut sup.* A v. B, or Laird of B v. a Poor Boy, 1853, Mor. 8410, 15,209.

⁷ Macrorie v. Macwhirter, &c., *ut sup.*

on a verbal bargain for that term, followed by a substantial *rei interventus*, by the conversion of the field from arable to garden culture.¹ [All such cases, however, are questions of circumstances, the only principle being that the alleged *rei interventus* must distinctly apply to a contract of longer duration than a year.]²

Parole evidence of *rei interventus* must necessarily be competent, as a contrary doctrine would be tantamount to a practical exclusion of this mode of validating a verbal lease. Accordingly, it has been said that the Court has more than once, in cases which are not reported, allowed a proof with the intention of supporting the verbal bargain should extraordinary meliorations be proved;³ and one case is named.⁴

CHAPTER IV.

WRITTEN LEASE.

SECTION I.—EVIDENCE OF CONSTITUTION AND TENOR.

When a lease of lands or its adjuncts is to endure beyond a year, it must be in writing, because it is an obligation relative to heritable property.⁵ An opinion (apparently sound) was given,

Art. 1.—
Written evidence neces-

¹ Campbell v. Dougall, 1813, Hume, 861, 1 Bell on Leases, 290.

² [For examples see cases cited at p. 369, Note 2, especially Bathie v. L. Wharnccliffe; also Wark v. Bargaddie Coal Co., 15 March 1859, 3 Macq. 467, 31 Jur. 323, 767, 21 D. (H. L.) 1, *infra*, p. 380.]

³ 1 Bell on Leases, *ut sup.*

⁴ Campbell, *ut sup.* A tenant sublet part of his farm, and made in his note-book a jotting which was signed both by himself and the subtenant. Possession followed in terms of that jotting. It was held that the tenant, who alleged that the jotting produced in an action against him for the rent was not the one he signed, but was false and fabricated, must undertake to make improbation of it; and he having so done, it was held on the evidence that he had failed to prove his allegation. *Williamsons v. Kennedy*, 13 Feb. 1857, 19 D., 29 Jur. 207. The

report in the Scottish Jurist, after a short statement of the matter of fact, bears that it was "held that there being a written document, and *rei interventus* having followed," the tenant "was not entitled afterwards to repudiate the terms of the memorandum and to prove *prouit de jure* that he had bargained for the whole grazings of the farm." The result stated in the former of these reports appears is the correct one; but the case is not, as indicated in the marginal abstract of that report, one under the law of lease, but under the law of proof; and therefore, while the Author has thus noticed it, he does not deem that it could be embodied in the text as a decision under the law of landlord and tenant.

⁵ Authorities *sup.*, sec. 2 of chap. iii. of this book, p. 364-5. [*Gowans v. Carstairs*, and cases cited, p. 369, Note 1.]

Lease for
years must
be in
writing.

[358] that where there is only one principal lease, the landlord, "if he gives it to the tenant, is bound to keep a copy,"¹ although to what effect or extent that copy would be available *per se* is a question which would require consideration.²

The constitution of a lease for a term of years by evidence purely parole is unknown to the law of Scotland; and a case³ which has been ruled to a contrary effect in the Court of Exchequer, must be guarded against as being drawn into a precedent. In a suit there regarding arrears under a tack of teinds claimed by the Crown, neither the tack itself nor a decree of proving its tenor was produced; and no proof was adduced to show that it had been lost or destroyed. But it was laid down as law by the presiding Judge [Lord Neaves] that "in the actual case, and in that Court in which the law administered is in a certain degree assimilated to the law of another country, secondary evidence may be received. And if evidence has been led which satisfies the minds of the jury that such a tack existed in the terms set forth, they are entitled to hold such evidence sufficient to supply its place." Although the Court of Exchequer is governed by the rules of the law of England in questions relating to the public revenue, in which the laws relating to the two countries must not only be assimilated but must be identical, it does not necessarily follow that the rule applies where the subject-matter of the suit appertains to the law of Scotland exclusively. But deeming this to be an open question as within the Court of Exchequer, it is certain that the law can nowise be extended beyond the particular court in which it was laid down.⁴

Art. 2.—
Effect upon
the Grantor
and his
representa-
tives.

If a lease be in writing, it is sufficient to bind the grantor and his representatives, although deficient in the other statutory requisites which render it obligatory upon singular successors; for a proprietor may grant a lease which shall be binding upon himself and his representatives upon such terms as to rent and duration as he deems proper.⁵ In consequence, a lease without an *ish* (definite termination), and really for perpetuity, was held to be good against the heir of the grantor.⁶ And there were sanctioned leases to endure

¹ *Per* L. J.-C in *Brown v. Coll.* of St. Andrews, 11 July 1851, 13 D. 1355, 23 Jur. 627.

² [See *Grant v. Sinclair*, 23 March 1861, 23 D. 796.]

³ *Adv.-Gen. v. Sinclair, &c.*, 15 Jan. 1855, 17 D. 290.

⁴ The case is noted in *Dickson on Evidence*, p. 1031. After having shortly stated the tenor and the ruling, the

Author says, and soundly, "this ruling may be questioned."

⁵ *Authorities sup.* chap. i. p. 361, and *Bell's Pr.* 1190, 1194, 1197-8; *More's Notes*, ccxlv.-vii.

⁶ *Ross' Lect.* 490. 1 *Bell's Com.* 66, Note 2. *Bell's Pr.* 1194. *Crichton v. Lord Air*, 1631, Mor. 11,182. *Stewart v. Visc. of Ayr*, 1631, Mor. 15,191. *Caruthers v. Irvine*, 1771, Mor. 15,195.

[359] until sums lent by the lessee to the lessor should be repaid.¹ On the same principle, a lease for an elusory rent,² or for services, or any other return, or in payment of a debt, or as a security, or for any similar purpose, would be valid.³

A formal deed, containing the stipulations in a detailed technical style, is the proper form of constituting the contract. But as *Pactum de assedatione facienda et ipsa assedatio æquiparantur* is a brocard of the law of Scotland,⁴ no specific form of writing is requisite to constitute a valid lease; and therefore when the subject-matter and stipulations are clear and certain, the contract is complete.⁵ A written minute of lease therefore, or an obligation or missive letter by the proprietor to grant a lease, has equal force with a formal lease, because upon that minute or obligation an action for implement lies against the granter and his heirs.⁶ In a case, the details of which have been already given, a lease was held to have been constituted by combination of three letters of different dates, written by the proprietor to a judicial factor and to a land-surveyor, combined with an entry in the rental-book by the judicial factor.⁷ As in mutual contracts both parties must be bound, the doctrine involves the counterpart of the obligation, conformably with which the lessee is bound by mutual stipulations if the transaction be by a minute, and by acceptance if by missive letters.⁸

Art. 3.—
Purport of
writing.

Minute or
obligation to
grant a
lease equivalent
to formal
lease.

But, 1st, it has been said that it appears to be necessary, and to have been so found in one or two unreported cases, that the writing be granted *eo intuitu* as evidence of the bargain, and that it will not be sufficient, for example, that in a receipt for a first year's rent mention be made that the lease is to be current for a certain number of years.⁹ And 2d, if the writing be not probative, or be otherwise defective or incomplete, it will not be effectual unless the [360] defect be cured by possession or *rei interventus*. In order to

Ker v. Waugh, 1752, Mor. 10,307-9. Wight v. E. Hopetoun, 1763, Mbr. 10,461, 15,199. Scott v. Straiton, 1771, Mor. 15,200.

¹ Bell's Pr. 1197, *ut sup.* Armour v. Lands, 1871, Mor. 16,284. M'Tavish v. M'Leuchlin, 1748, Mor. 1736, 15,284.

² Sinclair v. M'Beath, 1788, Hume 773.

³ Ross' Lect. 494; 2 Stair, ix. 43, Note α (by Brodie), art. 2.

⁴ 2 Craig, x. 10; 2 Stair, ix. 6.

⁵ 2 Bankt. ix. 5.

⁶ 2 Ersk. vi. 21; Tait's Jus. Peace, 384; and *sup.* authorities, chap. i. p. 360.

⁷ Gray v. Low, &c., 21 Jan. 1859, 21 D. 293, 31 Jur. 157. As to details, *supra*, book i. chap. vii. sec. 2, art. 2, p. 228. [Comp. Forbes v. Wilson, 22 Feb. 1873, 11 Macph. 454.]

⁸ An agreement for a lease is mentioned in the 13 and 14 Vict. c. 33 (15 July 1850, Police and Improvement Act), sec. 316, and has been used in Scotch causes in the House of Lords. The term is English. If such a deed were made in Scotland, it would be dealt with in the mode and to the same effect as a minute or obligation.

⁹ Tait's Law of Evid. 223.

render the writing obligatory, it must be certain that all of the stipulations were agreed to by both parties. Thus, a party made an offer to the proprietor of a mill for a lease of it. After several communings a draft of a lease was prepared and approved of by both parties. The lease was extended during the landlord's temporary absence from the country by his agent. In the extended lease there was inserted a stipulation binding the landlord to make certain repairs on the buildings. The lease was subscribed by the tenant. On his return the landlord refused to sign the lease until the stipulation regarding repairs was abrogated. The tenant having declined to accede to this proposal, the landlord refused to give him entry. An action of implement was raised at the tenant's instance, in which it was held that there had been no concluded contract between the parties, and that the landlord was entitled to decline acceding to the condition as to repairs, although the lease had been prepared by his own agent, as the tenant had failed to prove that the agent was specially authorised to insert that condition. And the document was held not to be obligatory.¹ [Although as a general rule the acceptance of an offer must meet the offer precisely, so that there is a *consensus in idem placitum*, it was held that an acceptance of "your offer for my mill" in reply to an offer to take a lease "of corn and flour-mills, and pig's-houses and boilings, &c.," constituted a lease of the premises, there being no doubt as to the intention of the parties; and that the words "subject to a lease drawn out in due form," did not introduce a condition into the acceptance, and a remit was made to prepare a lease.²

A written offer from the tenant stating rent and ish, along with circumstances on the part of the landlord inferring acceptance, and followed by outlay on the part of the tenant, was held to constitute a binding lease for years.³

Art. 4.—
Construction
of
writing.

Discrepancy
between
lease and
previous
minute or
missive.

In construing the written evidence, the decisions present certain rules which, although not always precise, must be deemed operative in practice.

1st, If there should be any variance from the original terms of the contract, including discrepancy between the formal lease and the previous minute or missive letter, the lease itself forms the rule of judgment. This doctrine is precise. Where a minute of lease

¹ Dallas v. Fraser, 26 May 1849, 11 D. 1058, 21 Jur. 404.

² [Erskine v. Glendinning, 7 March 1871, 9 Macph. 656.]

³ [Forbes v. Wilson, 22 Feb. 1873, 11 Macph. 454.]

was signed by both parties, letting a certain piece of ground for a specified rent, and a regular lease was afterwards executed, including a certain other piece of ground, but stipulating only the same rent as in the minute, the lessee, not having been put into possession of both pieces of ground described in the lease, refused to pay the rent. The plea that it had never been intended to let the second piece of ground, and that it had been inserted in the lease by mistake, was overruled; and the decision was that the lease, and not the previous offer or minute, must be held to regulate the bargain between the parties.¹

2d, By written evidence of subsequent dealings the contract may be modified in its annual operation, or even permanently.² [And an agreement varying the terms of a lease may be proved by writing or by oath of party, but not by parole.³]

Modification of lease by subsequent agreement or dealings.

[361] This doctrine is illustrated by a recent decision,⁴ the adoption of which as a precedent may admit of doubt. A farm had been let for fifteen years from Whitsunday 1836. The rent payable was the price and value of a quantity of grain specified, and that price was to be regulated by the Sheriff's fiars. An action was raised for payment of a sum, being the balance of rent alleged to be due for the crop of a certain year. The question was, whether there had been an alteration made on the terms of the lease, so that, instead of the original grain-rent, the rent payable by the lessee had been changed into a fixed money-rent. The lands had been bought by the actual proprietor after the lease had been entered into. He alleged an arrangement between the then proprietor and the lessee, by which that commutation had been made. The lessee had paid the fixed rent for several years. But, as the rent for the

Baillie v. Fraser.

¹ Earl of Fife's Tra. v. Duncan, 1824, 3 S. 241.

² Riddoch v. Wightman, 1790, Hume 776. Gill v. Winning, 28 May 1839, F.C. 944, 7 S. 677. Law v. Gibsone, 3 Feb. 1835, F.C. 220, 13 S. 396. Grant v. Watt 1802, Hume 777. Thomas, &c., v. Dumbreck, &c., 14 Jan. 1834, 12 S. 285, 6 Jur. 181. Lindsay v. Webster, 19 Dec. 1841, 4 D. 231, 14 Jur. 69. These cases specially relate to abatement of rent, and the details of them shall therefore be given hereafter, under book iv., when treating of that subject. [See Sinclair v. McBeath, 19 Dec. 1869, 6 Macph. 273, as to the effect of a draft minute modifying the terms of a previous lease, signed by the tenant and alleged to have been validated *rei interventus*.]

³ [Philip v. Cumming's Exrs., 3 June

1869, 7 Macph. 855. Stewart v. Clark, 4 March 1871, 9 Macph. 616. Cf. Sinclair v. Macbeath, *supra*. Walker v. Flint, 20 Feb. 1863, 1 Macph. 417, &c.]

⁴ Baillie v. Fraser, 15 June 1853, 15 D. 747, 25 Jur. 449. The report of this case, and apparently the opinions, are so much complicated with details that it is difficult to present matter out of which pure doctrine can be elicited. The case is one of a numerous class of recent decisions which are reported as having been given under the circumstances detailed. Although, therefore, general doctrine may be elicited, it might admit of doubt whether such decisions can be held as having the precision which is necessary to create precedents by which the law is to be governed.

crop in question, if calculated according to the fair prices of the grain-rent, would be less than the fixed money rent, he refused to pay more than the amount of the grain-rent. The landlord relied on the rental-book, two letters written by the lessees, and receipts for rent granted to the lessee, and accepted by him. The dates of these several documents extended throughout a period of (about) eleven years, and the last receipt was for a sum paid to account of the rent for the crop in question, and it was for the difference between that sum and the larger one demanded by the landlord that the action was raised. The lessee relied mainly—*first*, on the allegation that no agreement had been entered into for permanently reducing the rent, for, if it had been so, there would have been specific evidence by a docket endorsed by a lease; and *second*, that he having complained that the rent was too high, a compromise was made, which was given effect to in the last receipt. It was held that by the *res gestæ* between the landlord and tenant the original grain-rent had been converted into a fixed money-rent, and that this conversion was permanent, and to endure to the end of the lease. In the opinions great reliance appears to have been placed on the number of successive abatements vouched by documentary evidence, which was deemed to infer an intention by the parties to alter permanently the original contract. There were [362] difficulties and doubts expressed, and the permanent alteration, by a series of inferences of a formal and specific contract, certainly admits of such expressions.

Conditions
imported
into in-
formal
written
lease.

3d, The doctrine of possession on an improbate missive of lease is not exclusive of the establishment of conditions not embodied in the missive; for where the document is imperfect, *ex facie*, as not narrating them, but merely stating that the other conditions of the lease will be such as granted to other tenants on a renewal of their leases, documents subsequently passing between the landlord and tenant are admissible to supplement the conditions of the lease, and to prove the tenant's cognisance of it and acquiescence in the other conditions indicated, although the tenant had taken partial possession of the subjects in the interval between the original missive and the subsequent documents. An interdict against the tenant was granted for violating the conditions held to have been established in supplement.¹ If this case is to be relied on as a precedent, the doctrine which it embodies will in its application require to be carefully considered; for it is not readily reconcilable with the doctrine hitherto recognised, that where possession by several acts, although of short duration, has followed upon any improbate mis-

¹ E. of Mansfield and Threahie v. Henderson, 5 June 1856, 18 D. 989, 28 Jur. 448.

sive, the tenor of the missive must govern the tenor of the contract, which a subsequent document would be inadmissible to control and superadd to. But the opinions of the Court, although not free from ambiguity, involve apparently the doctrine of homologation by the lessee of the conditions of a subsequent missive, and it may be deemed that on this special matter the tenor of the second document was held to be an integral part of the contract. When thus viewed, the judgment may be considered to be sound; but its operation, if involving general doctrine, must be modified.

As already stated, the doctrine that a lease for a term of years can be constituted by the oath of a party, has been long ago overruled.¹ But a promise (to obtain a decree of thirlage against feuars) made to a lessee of mills, and the non-performance of which was pleaded by the lessee in bar of a suit for rents, was, notwithstanding a plea that it could be proved *scripto* only, held to be provable by the oath of the lessor.² Such a reference to oath [363] would now probably be overruled as inconsistent with the principle that the written evidence, if unambiguous, must be conclusive. In a subsequent case it was decided that an essential defect in missives could not be supplied by oath; for, in a process of sequestration, a landlord having offered to refer to the oath of a party alleged to be his tenant, whether a lease for a term of years, at a higher rent than he had accepted for ten years from a person in possession of the farm, had been constituted by missives defective as to the term of entry and period of duration, the reference was not admitted.³

Parole evidence of the constitution of a lease for a term of years has been shown to be inadmissible.⁴ But as to this matter the decisions have varied. In a case of old date it was held that a verbal bargain letting hay in steelbow for nineteen years, when a written lease of the land was granted for that period, but which part of the bargain was not inserted in the lease nor reduced into writing, was, notwithstanding, provable by witnesses.⁵ But this doctrine was subsequently overruled. 1st, Where a lease had been

¹ Sup. sec. 3 of chap. iii. p. 369. [*Sed quare* as to the grantor and his heirs. See Bell's Pr. 1187, and *supra*, p. 369.]

² *Johnstone v. Dean of Guild of Aberdeen*, 1676, Mor. 13,480.

³ *Thomson v. Young*, 1828, 7 S. 32, Nota. This case was involved in circumstances special and unusual; but the doctrine stated in the text may be gathered from it. And this doctrine

accords with the rule that constitution by oath is inadmissible, because there is no real variance between constituting a lease and making a new and different agreement supplying essential defects.

⁴ *Supra*, sec. 3 of chap. iii. of this book, p. 367, *et seq.*

⁵ *Harrower v. Wells*, 1749, Elch. (Prescription), 31.

Art. 5.—
Oath of
party.

Art. 6.—
Admissibility of
parole evidence in the
constitution, or for
the control
or explanation
of a
lease.

taken, and a bond for the rent granted, payment of the rent was refused, upon the ground that at the time of the bargain a certain verbal promise had been made to the lessee by which he was induced to give the rent demanded; and of that promise a proof by witnesses was craved. But that proof was refused as incompetent, by reason of the doctrine that the terms of a lease in writing cannot be altered, nor a bond, apparently absolute, rendered conditional by the evidence of witnesses.¹ 2d, The doctrine was deemed to have been established that a lease is a solemn contract, the terms of which cannot be controlled and redargued by parole evidence; and that if this were admitted a great injury would be done both to the law and to the public.²

*MacLeod v.
Urquhart.*

There are two cases which may appear at first to be either obstat or deviations from the rule, which, however, on examination will be found to be reconcilable with it. *First*, A report bears that [364] "parole proof was allowed to supply the omission of the agreed term of years in a missive of set." The reporter says, "This case is so far deserving of notice, as parole evidence was here admitted to supply a material omission in a written title of possession, which regularly ought to set forth the subject, rent, and term of years. The circumstances were however peculiar, and thus far favourable to the tenant, as the missive, expressed as it was, plainly implied an agreement for more than one year; and it had been followed with a substantial *rei interventus* in the man's enlistment in service for six years. He had accordingly been allowed to possess for nine years; and parole evidence was required, not to contradict any part of the contents or supply some article by inference which had been overlooked or neglected, but to explain and apply the contents according to the true intention and covenant of parties."³ From the tenor of the commentary the learned reporter may be deemed to have entertained doubts of the soundness of the decision; and he obviously guards against the adoption of it, as infringing on the recognised doctrine.

*Dods v.
Walker.*

Second, A farm belonging to C having been advertised to be let, a letter was written by A to B, acquainting him that he had been preferred as lessee. A minute or memorandum of an intended lease was drawn up and subscribed, but was afterwards destroyed by A. Implement having become unattainable in consequence of the refusal of C to approve of B as lessee, an action of damages was raised by B against A. A was allowed to prove that B had

¹ *Mags. of Glasgow v. Macfai*, 1755, Mor. 12,341, 2 *Stair*, ix. 43, art. 2, Note c (by Brodie).

² *Lawson v. Murray*, 1825, 3 S. 536.

³ *Macleod v. Urquhart*, 1808, Hume 840.

all along understood that he had no authority to conclude a bargain, and that it was only in the event of C's approving that his acceptance was to be binding. The plea that written documents could not be modified by parole evidence was overruled, upon the ground that allowing a proof of A's allegation in the actual case did not at all infringe the general rule.¹ The reasons of this opinion are not detailed; but the principle probably was, that the condition being suspensive, no agreement could be entered into until the requisite approbation was obtained; and therefore that the parole evidence did not go to control a written contract, but to establish that there had been no contract.

Accordingly the rule has been held to be in force; for a party having made an offer for a lease of certain subjects, and given a reference as to his responsibility, and relied on the entry of his name in the factor's book as tenant, and on certain letters and other relative writings, it was held that there was no lease or concluded agreement, and that parole evidence was inadmissible to prove that there was.²

Whether parole evidence was competent to vary, control, or otherwise [365] expiscate the stipulations or clauses of a lease, is a question on which the more recent law may be deemed to indicate a modification of the older doctrine. The rule was laid down that it is not competent for the lessor to prove by parole evidence any obligation against the lessee which was not contained in the lease; and for a series of years the doctrine was neither questioned or modified. In a recent case it was indicated that when a dispute arises within a short time after the tenant's entry, as to a particular stipulation not finally settled, it would require consideration to say that it was incompetent to ascertain by parole what had been the understanding and what were the conditions under which other leases similarly situated were in course of adjustment, so as to ascertain what were the conditions of the lease in question;⁴ and in a subsequent case it was doubted whether parties could

Competency of Parole to vary stipulations of written lease.

¹ *Dods v. Walker*, 1822, 2 S. 81.

² *Morrison and Brechin v. McKirdy and Kirkwood*, 14 Dec. 1841, 4 D. 254, 14 Jur. 100. In the *Jurist*, vol. xv. p. 638, the marginal abstract of a case (*Sinclair v. Sinclair*, 20 July 1843) bears "circumstances which held sufficient to ground a presumption that a party whose name appeared in a written lease was not truly sole, but, at the utmost, only joint tenant along with another whose name did not appear on the document, but who lived on the farm."

While this statement forms a suitable introduction to the actual subject-matter, it ought not to be deemed to imply that the case is to be classed under the law of lease; for it was expressly held in the inferior court that "the question as to the right to the lease of the subjects is not here raised."

³ *Maxwell v. Burgess*, 1773, Mor. 12,351.

⁴ *Per Lord Deas in E. Mansfield and Threshie v. Henderson*, 5 June 1865, 18 D. 28 Jur. 448.

by a verbal agreement drop a clause out of a lease, which would virtually have been to make a new lease.¹ This appears to involve the competency of parole evidence as to the existence of such an agreement, reserving the question of its efficacy in law. In both cases the *dicta* were *obiter*, and nowise influenced the *rationes* of the judgment; but they indicate a tendency towards a modification of the general doctrine. Whether the results of such a tendency would be beneficial may well admit of grave doubts.

Wark v.
Bergaddie
Coal Com-
pany.
Variation
proved by
parole with
*rei inter-
ventus*.

Important doctrine has recently been laid down in the last resort. A proprietor, by a written contract of lease, let the coal under his lands. The lessees were restricted from working within fifteen feet of the boundaries. On the allegation that this stipulation had been violated by the lessees, the lessor brought an action to have them compelled to erect a wall or barrier of the thickness stipulated. The lessees were also tenants of the coal in the lands adjoining. They alleged that the lessor had consented to allow them to work through the adjacent coal. And they set forth on the record various matters which, as they maintained, involved *rei interventus*, and proved consent and acquiescence. [366] The lessor admitted knowledge of what had occurred, but denied the existence of evidence of consent and acquiescence. In the Court below it was held² that it was incompetent to prove by parole, against the provisions of the written lease, that the lessors had consented to abandon the restrictions as to working, and therefore that the lessees were not entitled to a proof of their allegations as to consent or abandonment, or to establish acquiescence. An agreement by verbal consent to work through the barrier having been averred, it was held to be perfectly incompetent to prove such relaxation of, or departure from, an important part of a written lease by parole evidence; that to offer to prove that such a request was made, and that the subsequent operations tended to shew it was reasoning in a circle; that the first thing to be established was that there was such an agreement as that averred; therefore any operation which took place after that date could never be of the smallest value in proving the existence of that agreement. The gist of the doctrine is, that alteration of stipulations cannot be proved by parole, and that such proof being excluded, *cadit questio*.

Wark v.
Bergaddie
Coal Com-
pany on
appeal.

On appeal a different doctrine was laid down. "If after a parole agreement (it was said) has been made, there is what the law calls *rei interventus*, that is, if there are acts and circumstances

¹ Per Lord Deas in *Granger v. Geils*, 16 July 1857, 19 D. 1010, 29 Jur. 405.

² *Wark v. Bergaddie Coal Co., &c.*, 6

March 1856, 18 D. 772, 28 Jur. 319; [rev. 15 March 1859, 3 Macq. 467, 31 Jur. 323, 767, 21 D. (H. L.) 1.]

following upon the agreement in performance of it, then it is no longer revocable. It is as valid as if it had been made in writing." The allegations in fact relied on by the appellants were put on that ground. If the alleged acquiescence had been rested entirely upon the mere verbal consent, it would have been in vain; but that consent was followed by facts and circumstances involving costly operations—something allowed to be done which cannot be undone—and although these might have been insufficient to constitute an agreement by themselves, they are sufficient to give validity to a previous verbal agreement, and, if proved, the law will presume that there was a completed agreement or conventional permission. The doctrine that the verbal agreement and the allegation of acquiescence by *rei interventus* are to be severed must be repudiated; the averment of the verbal agreement and of the *rei interventus* must be viewed in combination and as forming a whole, and a proof consequently of the matter alleged to prove that *unum quid* ought to be allowed.

The judgment of the Court below was therefore reversed on this point and the case remitted to the Court of Session, with a declaration that the Court ought to have directed an issue whether the barrier-coal so worked and removed by the appellants was so worked and removed with the consent of the respondent, and that after the trial the [367] Court will deal with the interdict and the rest of the case as justice requires. While the doctrine must in its application to the special case be recognised as unquestionable, its adoption as an integral portion of the common law of Scotland admits of serious consideration, without disrespect to the high authority from which the judgment came.¹

SECTION II.—FORMAL WRITTEN LEASE.

The object of this section is to state the different clauses of which an agricultural lease ordinarily consists, reserving for future discussion the rights and duties of lessor and lessee which emerge out of those clauses. Although this enumeration necessarily contains those clauses, the existence of which marks the conversion of the personal right into the real, yet, if possession have not actually followed, the right notwithstanding those clauses remains personal. The insertion of them, therefore, in this place is correct.

The agricultural lease has been selected for the purpose of

¹ [The case has since been regarded as authoritative. See above, pp. 369-371.]

detailing the clauses, because it is certainly the most ordinary, and often the most varied.¹

Art. 1.—
*Classes of
description
of parties.*²

The contract commences by narrating that "it is contracted, finally agreed, and ended" betwixt the heritable proprietor or life-renter [368] of the lands let on the one part, and the person who becomes lessee on the other. The parties and lands must, of course, be so described by name and designation (addition), as to distinguish them from all others. Where there is to be a cautioner the lessee himself is described as "principal," and the cautioner, by name and designation, as "cautioner and surety" for the principal. But a cautioner is very seldom required in the great agricultural districts, and, if at all, only for the rent of the first year. The legal characteristics of lessor and lessee have been already fully explained,³ and those of cautioner shall be explained in the sequel.

Art. 2.—
*Classes of
Destination.*

The second is the clause of destination,⁴ which sets forth that the proprietor has "set, and in tack and assedation let," the lands to the lessee, his heirs, assignees, and sublessees, or otherwise, expressly excluding assignees or sublessees, legal or conventional, factors, managers, or partners, unless with the special consent and

¹ The tenor of the clauses of the agricultural lease has been derived from a comparison of several actual leases, combined with the purport of the Books and Decisions, and the details given in articles upon "the Lease" contained in the Journal of Agriculture, the System of Agriculture, forming an article written by Cleghorn for the Encyclopædia Britannica, and also published in a separate volume, the second edition of Low's Elements of Practical Agriculture, Low on Landed Property, Stephen's Book of the Far. 1st edit. vol. iii. pp. 1315-23, 2d edit. vol. ii. pp. 505-16; the Agricultural Report of Berwickshire, (by Kerr), that of East Lothian, and other Agricultural Reports. This information has been corroborated by frequent communications with friends thoroughly conversant both with the science and the practice of agriculture. An examination of very recent leases has satisfied the Author that there has been no change in the nature of the clauses since the publication of the first edition of this treatise. A style of the agricultural lease, according to the most approved

principle and usage, is inserted in the Appendix, Nos. i. ii. and iii. These examples of agricultural leases are retained unaltered, having been selected on the recommendation of good judges. The Author thought it likely that improvements on the agricultural lease might recently have been made. But he has been informed by eminent practical agriculturists that, although in some instances there have been changes on the stipulations, these changes have not been improvements. Minute rules have been inserted, and the operations of the agriculturist fettered by restrictions which do not tend to the advancement of good husbandry. In all probability this stringency will be abandoned, and general recourse be again had to the more liberal system. Menzies, in his Lectures, p. 825, refers to 1 Jurid. Styl. 4th edit. 462, for a precedent of the style of an agricultural lease in its most simple form, and gives a short abstract of one.

² App. Nos. i. ii. and iii.

³ Sup. book i. pp. 81-255.

⁴ 2 Ross' Lect. 481-2.

approbation of the proprietor, his heirs and successors.¹ Certain special provisions may be inserted under this clause. *1st*, Power may be given to a lessee to name an heir by settlement, and appoint a manager for an infant heir. *2d*, In case of devolution to heirs, either of line or by settlement, it may be provided that it shall be without division. *3d*, Conditions and restrictions, in case of assigning or subletting. For example,—*first*, that the lessee shall have no power to assign or sublet until he shall have been a certain number of years in possession; *second*, that he shall be allowed to assign or sublet the lands only as one farm, and not in small portions; and *third*, that the proprietor shall, upon equal terms, be preferred (if he think fit) to any assignee or sublessee.² *4th*, In a liferent lease, where the liferenter may not continue in the natural possession, it may be stipulated that the sublessee, or other person possessing under the liferenter, shall be bound, when required by the lessor, to produce evidence that the liferenter is alive.³

The third clause is that by which the subject is conveyed, or the [369] right of possessing it is given to the lessee.⁴ It contains—Art. 8.—
Clause of
Possession. *1st*, a description of the subject let. The various kinds of subjects have been already enumerated. In describing the subject, the most simple mode is by its name, and by the name of the county and parish if in the country, and of the town and street if in a town. If the subject be a farm, it is usual to describe it by its boundaries, or by a reference to a plan and measurement, docketed and signed by the parties.⁵ Mills are described by the name, the particular kind of mill, and with the appurtenances, viz., the miller's house, kiln, damhead, lead, with the astricted multures, sequels, and services thereto belonging.⁶ Mines are described by their local name, or by the name of the lands where they are situated.⁷ Fishings, by name and situation. But the safest rule in all cases is to refer to the possession of the immediately preceding lessee, which will ordinarily exclude all difficulty.⁸ And *2d*, it confers a

¹ 2 Ross' Lect. 481-7. 1 Jurid. Styl. 4th edit. 468; 2 Journal of Agriculture, 136. This exclusion is sometimes carried much further, and to a length which is practically inadvisable, viz., of all assignees, legal and conventional, direct or indirect, managers or trustees for behoof of creditors, subtenants of every description, graziers of any part of the lands, and heirs-portioners, the eldest female succeeding always without division. 1 Jurid. Styl. 4th edit. 473.

² 1 Jurid. Styl. (2d edit.) 633.

³ 1 Bell on Leases, 277, Note x. No. 1.

⁴ Dallas 509, and Spottis. 363. 2 Ross' Lect. 487. 1 Jurid. Styl. 4th edit. 462. Journ. of Agricult. *ut sup.*

⁵ Bell on Leases, *ut sup.*

⁶ 2 Dallas 510; 1 Jurid. Styl. 4th edit. 539.

⁷ 1 Jurid. Styl. 4th edit. 499, 504, 512, and 524.

⁸ 2 Ross' Lect. 487; 1 Bell on Leases, 301.

right to possess and occupy the subject peaceably during the period specified.¹

Art. 4.—
Cluses of
duration.²

1st.

Entry.

To arable
farm.

Intimately connected with the immediately preceding clause is the fourth, that by which the duration of the lease is regulated.³ 1st, There is specified the number of years during which the lease is to endure, creating consequently what is styled a definite *ish* of the lease.⁴ 2d, The period of the lessee's entry, from which the duration is to commence, is then set forth. The term of entry varies in subjects of different kinds, and in different parts of the country. To an arable farm the term of entry is ordinarily Whitsunday as to the houses, fallow lands, and grass, and Martinmas after the separation of the crop of a specified year, or more generally after that separation itself, with regard to the rest of the farm.⁵ When the entry is at Whitsunday there is a provision that the incoming tenant shall enter to the fallow land, for the purpose of labouring it at the Martinmas preceding, unless (as is often the case) the outgoing tenant is taken bound to plough the fallow land once or (more frequently) twice before his removal at Whitsunday, the incoming tenant paying him at a certain rate an acre for such ploughing. But it is not unusual to enter the whole of the farm at Martinmas.⁶ In that case there is a provision that the incoming tenant shall pay the expense of the labour on the land that had [370] been in fallow the summer before, and also for the wheat sown. Occasionally, however, the incoming tenant is allowed to enter to labour the fallow and sow it himself; but practically it is hardly possible that in any case the entry to an arable farm can be complete at any given term. The tenant has almost always some work to do before he enters to and after he removes from the farm as a place of residence.

To gardens,
&c.

To gardens, and, in a word, to all land which produces industrial fruits, the term of entry must necessarily be so regulated as to give the right to the growing crop to the lessee by whom it was cultivated, leaving the land open to the incoming lessee to prepare the ensuing crop. Whitsunday is the ordinary term of entry to pasture farms.

To pasture
farms.

To houses. The term of entry to houses and other subjects is at the legal term of Whitsunday and Martinmas, or at such other terms as the parties shall stipulate.

¹ 2 Dallas *ut sup*; Spottis. 364; 2 Rose' Lect. 488; 1 Jurid. Styl. 3d edit. 672 and 677.

² 1 Dallas, 309; Spottis. 364; 2 Rose' Lect. 487; 1 Jurid. Styl. 4th edit. 464 *et seq.*

³ 2 Journ. of Agriculture, 136.

⁴ 2 Journ. of Agriculture, 128.

⁵ Dallas *ut sup*; 1 Jurid. Styl. 4th edit. 462 *et seq.* Opinion in *Gordon v. Robertson*, 11 March 1825, F.C. 748.

The term of entry to fishings is frequently at Andermas, the ^{To fishings.} 30th November.¹ That day was formerly the termination of close-time. But by the 9 Geo. IV. c. 39 (15th July 1828), section one, close-time was the period from the 14th of September to the 1st of February. [Under the existing statutes close-time has been fixed by the laws of the Commissioners for each district in Scotland, in most cases extending from August 27th to February 10th, with an extension for rod-fishing.²] An entry is very usual at any part of that period, and it is advantageous to enter during close-time, as the lessee has opportunity to make the necessary preparations. If local usage shall have established any particular term of entry to any subject, that term will of course be generally inserted.

3d, If there is to be a mutual privilege to renounce, or, as it is technically called, "a breach or break," this is the clause in which ^{Break in lease.} provision for it should be made. The tenor is, that the lessee shall have liberty to quit or renounce the lease and possession after the lapse of a specified number of years, and upon giving premonition of a stipulated length of time to the lessor; and that the lessor shall upon the same terms be entitled to remove the lessee.³

In general there are certain reservations made by the lessor, the details of which constitute the fifth clause. A few examples shall be given. 1st, Mines and minerals, with the power of erecting the requisite works and their appendages upon indemnifying the lessee for damage. 2d, Sea-ware. 3d, Woods, with power to take ground for planting. 4th, Power to make roads and straighten marches. 5th, Power to feu or exchange, and consequently to resume possession upon compensating the lessee. 6th, A right to hunt, shoot, [371] fish, and otherwise sport, personally or by delegation, upon indemnifying the lessee for damage sustained.⁴ Art. 5.—
Classes of
Reserva-
tion.

Should it be intended that meliorations are to be made by the lessor, a clause (the sixth) ought to embody the undertaking. The lessee may stipulate that he is not to reimburse the lessor; and it has been well observed that attention should be paid to the possibility of questions arising with purchasers or creditors or heirs of entail or other singular successors who may not be bound to implement the lessor's obligations,⁵ or the clause may be other- Art. 6.—
Classes of
Meliora-
tions by
Lessor.⁶

¹ Gordon v. Burnett, 1783, Mor. 13,859.

² [25 and 26 Vict. c. 97; 31 and 32 Vict. c. 123.]

³ 1 Jurid. Styl. 3d edit, 667.

⁴ Jurid. Styl. 4th edit. 469 et seq.; 2 Journ. of Agric. 138-9.

⁵ Append. Nos. i. ii. iii.

⁶ 1 Bell on Leases, 279-80, Note s No. 10.

wise framed, so that the lessee may be taken bound to pay additional rent if meliorations be made.¹

Art. 7.—
Clause of
Warrantice.

The clause of warrantice (the seventh) is in general absolute, and expressed in the same words as in a sale—"at all hands and against all deadly or all mortals."²

Art. 8.—
Clause of
Rent.

The clauses already mentioned ordinarily exhaust the stipulations by the lessor in favour of the lessee, and those now to be mentioned constitute the counterpart, embodying the stipulations by the lessee in favour of the lessor. The *eighth* clause is that by which payment of the rent is stipulated.

1st, By it the lessee and his cautioner (if there be one) bind and oblige themselves, jointly and severally, their heirs, executors, and successors, to pay the rent to the lessor.³

Kind and
mode of
payment.

2d, Rent may be of different kinds. *First*, Money, with a stipulation that in case of failure of payment there shall be exigible a certain (generally a fifth) part more of each term's payment as liquidate penalty, and the legal interest of the termly payments from the time when they shall respectively become due, and during the non-payment of them.⁴ *Second*, If the rent be payable in grain, the amount is stated simply by the specification of a certain number of bolls; or if it is to be converted into money according [372] to the fiars price or other standard, it is usual to specify one sum as a *maximum* above which the rent shall not rise, and another sum as a *minimum* below which the rent shall not fall, leaving it subject to the intermediate fluctuations.⁵ Grain rents are now, with scarcely any exception, paid not in the *ipsa corpora*, but are converted into money according to the fiars price, or some other standard set forth in the lease. *Third*, the rent may be made payable partly in grain and partly in money, which appears to have been the older practice, and has been resumed in some recent cases.⁶ *Fourth*, In addition to the money and "victual-rent" there is sometimes inserted a stipulation for the delivery of a certain number of fowls called "Kain," or a commutation in money.⁷ *Fifth*, By the older leases the lessee was frequently taken bound

¹ 1 Jurid. Styl. 3d edit. 685.

² 1 Dallas 509; Spottia. 364; 2 Ross' Lect. 493; 1 Jurid. Styl. 4th edit. 462-3; 2 Journ. of Agricul. 140.

³ Dallas and Spottia. *ut sup.*; 2 Ross' Lect. 494-5; 1 Jurid. Styl. 4th edit. 463 *et seq.*; 2 Journ. of Agricul. 140.

⁴ Dallas and Spottia, Ross' Lect.,

Jurid. Styl., and Journ. of Agricul., *ut sup.*

⁵ 1 Bell's Com. 71.

⁶ 1 Dallas 509; 1 Jurid. Styl. 4th edit. 469; 2 Bell on Leases, 151-4; Append. No. iii.

⁷ Dallas, *ut sup.*; 2 Ross' Lect. 495; 1 Jurid. Styl. 4th edit. 470.

to perform personal services called "Arages and Carriages."¹ These services being indefinite and oppressive, were abolished by the Jurisdiction Act, 28 Geo. II. But there may still be lawfully inserted an obligation upon the lessee to give to the lessor the service of a certain number of horses and men for so many days yearly.² These services ought at the option of the lessor to be convertible into money.³ *Sixth*, The lessee sometimes comes under an obligation to "pay all public burdens due and exigible forth of the lands, the receipts for which he is to report annually,"⁴ and for these payments he shall be allowed deduction out of the rent.⁵

3d, The terms at which the rent is to be payable are next specified. The legal terms of payment of money-rent are Whitsunday and Martinmas. But as money admits of any term of payment upon which parties can agree, it became frequent in leases to stipulate for the payment of rent at the commencement of the lease or before the lessee could reap a crop, which was termed "anticipated or forehand" rent, and sometimes the rent was not to be all paid for one crop till another was reaped, which was termed "postponed or backhand" rent. And in opposition to the legal terms, such terms of payment obtained the name of conventional terms.⁶ Candlemas and Lammas are frequently the terms stipulated. Payment of a grain-rent was sometimes made exigible between Yule (Christmas) and Candlemas, because having been reaped at the Martinmas preceding, it was presumed to be ready for delivery at Candlemas,⁷ and sometimes betwixt Martinmas and Candlemas. [373] When the entry is at Whitsunday and the separation of the crop then on the ground, the practice is to make the rent payable at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first term's payment thereof at the ensuing term of Martinmas, and the second term's payment thereof at the term of Whitsunday thereafter, and that for the first year's possession of houses, grass and fallow land, and for the crop (of the year specified), and so forth yearly during the currency of the lease.⁸ And it has sometimes been provided that the rent of the last year of the lease, whether exigible in money or

Terms of
payment.

¹ Dallas and Ross' Lect. *ut sup.*

² 1 Jurid. Styl. 3d edit. 682, and 4th edit. 470; 1 Bell on Leases, 280, Note 2, No. 16, and 2 Bell on Leases (Append. ii.) 159.

³ 1 Bell on Leases, 226.

⁴ Spottis. 366; 1 Jurid. Styl. 3d edit. 679.

⁵ 1 Jurid. Styl. 3d edit. 687.

⁶ 2 Ersk. ix. 64; Kames' Elucid. art. 9,

pp. 59-60.; Kerr's Agricultural Survey of Berwickshire, 140-1; 2 Journ. of Agricul. 133-4.

⁷ 1 Dallas 609; 2 Ross' Lect. 494-5; 1 Jurid. Styl. 2d edit. 628 and 636, and 3d edit. 678.

⁸ Spottis. 364-5; 1 Jurid. Styl. 3d edit. 687-8, and 4th edit. 463; 2 Journ. of Agricul. 140.

in grain, shall be payable fourteen days before the term of the lessee's removal.¹

4th, In order to secure regular payment of the rent a declaration is sometimes introduced, bearing that if one whole year's rent shall remain unpaid after the term of payment specified, or if two years' rent be allowed to run into the third unpaid, the lease shall, in the option of the lessor, be void and null without any procedure of law, and the irritancy shall not be purgeable.²

Art. 9.—
Clause of
Meliora-
tion by
Lessee.

An obligation (it is not deemed advisable)³ may be imposed upon the lessee, not merely to preserve the houses and other appurtenances of the farm, but to construct new ones. This obligation may form the ninth clause. Although its purport may admit of several variations, the most simple and usual course is that the lessor shall advance a specific sum, for which the lessee obliges himself to pay interest at a specified rate during the remainder of the lease, and to instruct that the sum was laid out as stipulated, obliging himself, if the whole sum shall not have been so expended, to repay the residue upon the expiration of the lease, with interest during the non-payment;⁴ or there may be an obligation to reimburse the lessee upon the expiration of the lease⁵ for money so expended by him. A special provision is sometimes made relative to conterminous inclosures, of which the lessee obliges himself to construct his share in common with the tenants of the adjacent farms.⁶

Art. 10.—
Clause of
Preservation.

By the *tenth* clause the lessee binds himself,—1st To preserve or keep the houses and offices in tenantable and habitable condition, [374] and keep in repair or in good and fencible condition the fences, gates, and similar appurtenances of the farm, and so to leave them upon the expiration of the lease.⁷ 2d, Where the former lessee was obliged, the actual lessee binds himself to implement that obligation, and the lessor assigns to him the obligation in the prior lease, so that he may exact whatever may be due under it, as the lessor himself could have done.⁸ 3d, If (as detailed under the immediately preceding clause) new houses or fences shall have been constructed upon the lessee's entry, the lessee may oblige himself to leave them in good condition, and undertake, if they should be

¹ 1 Jurid Styl. 2d edit. 635.

² 2 Ross' Lect. 497-9; 1 Jurid. Styl. 3d edit. 681, and 4th edit. 510; 2 Journ. of Agricul. 140.

³ 2 Journ. of Agricul. 131.

⁴ 1 Jurid. Styl. 4th edit. 471.

⁵ 1 Jurid. Styl. 2d edit. 633.

⁶ 1 Jurid. Styl. 3d edit. 683.

⁷ Spottis. 367; 1 Jurid Styl. 4th edit. 471, and 3d edit. 686; 2 Journ. of Agricul. 141-2.

⁸ Journ. of Agricul. *ut sup.*

found incomplete or out of repair, to pay to the lessor such a sum as shall be adjudged by referees to be adequate.¹ 4th, Provision should be made for the case of destruction by accidental fire, such as by whom the loss is to be repaired, and if by the lessee in the first instance, whether he is to be repaid by the lessor.² 5th, The clause relative to the march-dykes and fences is sometimes special, obliging the lessee to keep them in proper repair, and failing his doing so upon requisition, empowering the lessor to do so at the lessee's expense.³

In order to carry into effect the provisions of the preceding clause, and to secure the subject-matter of the hypothec, the lessee is by the eleventh clause bound to insure the houses and offices and (sometimes) the crop against loss by fire.⁴ 1st, The lessee obliges himself to insure within a specified period a specific sum upon the buildings; and 2d, The crop in the barnyard according to its value. The latter is frequently divided into three portions, each diminishing in amount, viz., at Martinmas, Whitsunday, and Lammas, as the quantity in the lessee's possession decreases. 3d, To pay the premiums and to report the receipts regularly; and 4th, The lessee may be required to assign to the lessor the policies of insurance and the sums which may become due under them, so that the lessor may recover and apply the sums to the loss sustained upon the houses, or to the rents due to him at the time.

Art. 11.—
Clause of Insurance.

The twelfth clause is that of thirlage (which, if possible, ought to be avoided), by which the lessee binds himself to carry to a mill [375] specified the whole grain which shall grow upon the lands, under the usual exceptions, to be grinded at that mill, and to pay the usual multure and knaveship, and to perform the services used and wont.⁵

Art. 12.—
Clause of Thirlage.

This clause (the thirteenth) comprising the stipulations for cropping and otherwise managing the farm is one of great importance both to the lessor and the lessee. In the older leases it does not appear to have been inserted; but in many modern leases it is framed with much minuteness and anxiety. As the course of agricultural management varies in the several districts of Scotland, according to the differences in the soil, climate, size of farms, pro-

Art. 13.—
Clause of Management.

¹ 1 Jurid. Styl. 3d edit. 679.

² 1 Jurid. Styl. 2d edit. 632, and 3d edit. 683.

³ 1 Jurid. Styl. 3d edit. 685-94.

⁴ 1 Jurid. Styl. 2d edit. 632, 3d edit.

683, 4th edit. 472; 2 Journ. of Agricul. 141.

⁵ Spottis. 366; 2 Ross' Lect. 496-8; 1 Jurid. Styl. 3d edit. 679.

ductions, state of population and markets, it is impracticable to give all the details which it may be proper to insert. In leases of extraordinary duration, as for two or three periods of nineteen years, the tenant is usually taken bound by specific clauses to leave the farm at the end of the lease in an improved condition; but in ordinary leases the leading object to which the rules of management are referable is, that it shall suffer no deterioration, but be returned to the landlord in a condition at least as good as at the commencement of the lease.

Ordinary
rules of
manage-
ment.

In those districts where agriculture is best understood, the following are the ordinary rules of management during the currency of the lease. *1st*, White corn crops ripening their seeds shall never be taken from the same land in immediate succession.¹ *2d*, A certain proportion shall be under turnips or plain fallow every year, and be sown to grass with the first corn crop after turnips or fallow. *3d*, No farmyard dung or putrescent manure made from the produce of the farm, nor straw nor hay made from the natural herbage, shall ever be carried off the farm. It is sometimes added that no turnips or rape or hay of any kind shall ever be removed or sold. And upon weak soils it is sometimes required that not less than half of the turnips shall be eaten by sheep on the ground where they grow. *4th*, If the soil is not such as to admit of being ploughed and cropped every year, it is stipulated that a certain part or proportion shall be always in grass, and that land laid down to grass shall be, before being broken up again, two or more years in pasture. *5th*, During the last five or six years of a lease the conditions are sometimes more special, obliging the tenant to have so much more in fallow or turnips every year, and so much more in grass, and also to leave the farm [376] in a particular shape so as to admit of the incoming tenant pursuing a correct rotation of cropping from his very entry. Or *6th*, What is approved of by some agriculturists, it may be agreed that the lessee shall cultivate the lands according to the rules of good husbandry, but with the addition of specific regulations applicable to the four or five last years of the lease.² *7th*, Adherence to the course prescribed may be enforced by conditioning for payment of additional rent in the event of contravention, besides damages, and with a power to prevent farther contravention, for which purpose power to make a summary judicial application is occasionally taken. Or *8th*, Liberty may be given to the lessee to deviate from

¹ Stephen's Book of the Farm, vol. ii. 506. In that valuable practical treatise this rule is recommended as of paramount importance, and as almost super-

seding the necessity of other restrictive conditions during the currency.

² Kerr's View of the Agriculture of Berwickshire, 124-5.

the prescribed course upon payment of an additional rent specified, which may be declared to be pactional and not penal, and not liable to judicial modification. 9th, In some districts, though seldom in the most improved, there is occasionally a stipulation that the lessee shall himself reside upon and manage the farm.¹

Circumstances may render it necessary to insert more special prohibitions. 1st, A prohibition from ploughing up certain grass fields which from any cause it is wished to retain in old turf; 2d, From cultivating plants that are supposed to be injurious or unsuited to the soil, as flax, hemp, &c.; 3d, Sometimes from pairing and burning; and 4th, A strict limitation on pastoral farms of the quantity of land to be broken up for tillage.²

The clauses of management relative to the termination of the lease usually are—1st, That the lessee shall be obliged to leave the whole of the dung of the penult crop, with or without payment; in the former case, according to a valuation. The ordinary mode of valuation is by reference to arbiters. 2d, The straw of the penult crop not used at the removal of the awaygoing tenant, as well as the straw of the last crop, may either be declared to be steelbow or to be paid for according to a valuation by the incoming tenant. 3d, Provision may be made restricting the lessee from selling or carrying off a turnip crop or other green crop during the last year as well as during any part of the lease. 4th, It is also deemed a beneficial regulation that as to the last crop, of whatever description, which is on the ground at the tenant's removal from the houses, the landlord, and through him the incoming tenant, shall have the power of purchasing it at a valuation at any time before it is ready to be cut. 5th, Provision should be made for the lessee's right to keep possession of the barns and similar offices, for the purpose of thrashing out and disposing of the last crop, if the arrangement last mentioned be not adopted.

[377] Bankruptcy does not of itself annul a lease, and the lessee, though bankrupt, may continue in possession if he perform the stipulations of the contract.³ But as bankruptcy must render payment of the rent precarious, may deteriorate the mode of cultivation, and may in many other ways prove injurious to the lessor, it is a common provision (forming the fourteenth clause) that if the lessee shall become bankrupt, expressed either in general terms or by reference to statute, or if a sequestration shall be awarded against him, or if he shall voluntarily divest himself of his effects, the lease

Art. 14.—
Clause of
Bank-
ruptcy.

¹ Drummond v. M'Pherson, 1799, Mor. App. (Tack.) 6. [Edmond v. Reid, 26 May 1871, 9 Macph. 782.]

² 2 Journ. of Agricul. 144.

³ 1 Bell's Com. 80. Crawford v. Maxwell, 1758, Mor. 15,307.

shall *ipso facto* become null and void, the lessee's right shall cease, and the lease shall be forfeited to the lessor, who shall be entitled to resume possession *brevi manu*, and without a declarator or any other procedure at law.¹ Or an option may be given to the lessor to put an end to the lease in case of insolvency or bankruptcy.² In either case provision should be made for the mode in which the creditors of the lessee shall be indemnified for sums expended in meliorations. If it should not be the intention of the lessor that bankruptcy should void the lease, the purpose may be effected by omitting the clause of avoidance and leaving the contract to be executed according to the rules of common law, or by inserting such provisions as may be deemed advisable. These will necessarily vary according to the nature of the subject, the amount of the rent, and the duration of the lease. But in general they will consist of provisions,—*first*, that the lessee himself shall be obliged to reside and act as manager for his creditors; or *second*, that the creditors shall have the power of appointing a manager; and *third*, for securing the regular payment of the rent and the implement of the other stipulations.

Art. 15.—
Clause of
Removal.

By this clause (the fifteenth) the lessee obliges himself to remove himself, his family, servants, and all his effects "from the said possession at the expiration of this lease," and to leave the "same void and redd," in order that the lessor, or others in his name, may attain possession, and that without any previous warning or process of removing to be used against him. In order to enforce this provision it is sometimes stipulated that if the lessee shall continue to possess after the expiration of the specified period he shall pay to the lessor [378] a specified sum as rent for each year during which he shall so possess, conformably to the terms, under the penalty and with the interest stipulated with relation to the original rent.³

Art. 16.—
Clause of
Reference.

In order to avoid law-suits between the lessor and lessee, it is usual to insert a clause (the sixteenth) providing that all differences arising out of the contract shall be referred or submitted to arbitration. These arbiters are either to be nominated by the parties when the occasion arises or they are named in the lease. In the former case, provision against a refusal to nominate is made, by stipulating that the Sheriff or judge-ordinary shall, upon the application of either party, have power to make the nomination.

¹ 1 Jurid. Styl. 3d edit. 682, and 4th edit. 473-4.

² 1 Jurid. Styl. 3d edit. 710.

³ Spottis. 365; 2 Ross' Lect. 499; 1 Jurid. Styl. 4th edit. 473; 2 Journ. of Agricul. 144.

In the latter case, the arbiters are either individuals, whom failing, certain law-officers for the time being, or those law-officers are at once named.¹ Power may be given to the arbiters to appoint an oversman.²

The tenor of the seventeenth clause is that the parties mutually oblige themselves to perform their respective parts of the contract under a penalty specified, and that over and above performance.³

Art. 17.—
Clause of
Mutual
Perform-
ance.

The eighteenth clause is that of registration common to all deeds.⁴ The only details which it is necessary to notice are—1st, that the registration is to be made in the Books of Council and Session, or in those of any other judge competent; and 2d, that the letters of horning proceed upon six days' charge.⁵

Art. 18.—
Clause of
Registration.

The nineteenth and last is the testing-clause. This clause being common to all deeds, and its requisites being matter of legal notoriety, it may perhaps be deemed superfluous to enter into the details of it. But, *first*, as the solemnities, although generally known, are occasionally mistaken or overlooked in practice, a summary [379] of them may not be devoid of use; and *second*, an exposition of the Stamp Laws as applicable to the contract of lease is indispensable. But as these matters must be examined more in detail than is compatible with the plan of this section, the discussion of them shall be embodied in subsequent sections,⁶ to which reference is accordingly made.

Art. 19.—
Testing-
Clause.

SECTION III.—VARIATIONS IN CLAUSES.⁷

In leases of certain subjects, which in a comprehensive sense may be called agricultural, as dairy or pastoral farms, there exist clauses different from those in leases of lands used chiefly for aration. In a lease of a dairy farm the rotation must be such that a large portion of the land is regularly kept in herbage, or forage plants, or in fallow crops.⁸ In a lease of a pastoral farm the fol-

Art. 1.—
Dairy and
pastoral
farms.

¹ [An agreement to refer to the person who shall hold a certain office when a dispute shall arise is not binding; Bell's Pr. 391. Buchanan, 1799, Mor. 14,593.]

² 1 Jurid. Styl. 3d edit. 689, 4th edit. 479.

³ 2 Dallas 509-10; Spottis. 365; 1 Jurid. Styl. 4th edit. 463.

⁴ 2 Dallas 363; Spottis. 7-8; 1 Ross'

Lect. 92-120; 1 Jurid. Styl. 4th edit. 463.

⁵ Authorities, *ut sup.*

⁶ Sections 4 and 5 of this chapter, p. 399, *et seq.*

⁷ The references to the Appendix are to Styles of the Leases noticed under this article.

⁸ Appendix No. iv.

read writing it must be proved, if disputed, that the deed was read over to him immediately before he subscribed it. Peers subscribe by their titles, peeresses by their Christian names and the titles of their husbands, and commoners by their Christian names and surnames, or by the initial letter of the Christian name and by the surname at length. Subscription of both Christian and surname by initials has been admitted when it was proved that such was the practice of the party subscribing. Accordingly, a cautioner's subscription by initials to a lease was sustained, as it was not denied that the initials adhibited were those of the cautioner.¹ But subscription by a cross or other mark is altogether invalid. Each sheet must be subscribed, and in practice each page is subscribed. The place at which the signature must be adhibited is below the writing, and in practice it is written at the right-hand side. If there be any marginal notes the party must sign them by writing his Christian name upon the one side, and his surname upon the other side of each note.

Witnesses.

2. ATTESTATION BY WITNESSES WHERE THE PARTIES CAN WRITE.—

Attestation by witnesses of the subscription of the parties is indispensable for the valid execution of a lease, which deed is held to come under the rule applicable to deeds of "great importance."² The witnesses must not be fewer in number than two. Pupils (*viz.*, persons under fourteen years of age) cannot be instrumentary witnesses, and as inveterate usage had excluded women from being instrumentary witnesses, it was considered inexpedient to admit a woman to act in that capacity. [But all doubt as to the competency of women to be instrumentary witnesses has now been removed by statute.]³ Although an instrumentary witness [386] cannot be objected to on the ground of infamy, witnesses of good character ("famous" witnesses in the language of the old law) should always be called. They must see the party subscribe or see or hear him acknowledge his subscription; and it will be safe, although it cannot be affirmed to be indispensable, that they should sign immediately after the party and in his presence. Each of them must subscribe his Christian and surname [or his usual signature, and he may now append his designation instead of having it inserted in the testing-clause. He must also] add the word "witness" to his subscription. Their signatures are adhibited only at the close (the last page) of the deed, and in practice are written at the left-hand side, opposite to the subscription of the party. When the lease is executed by the different parties

¹ *E. Traquair v. Gibson*, 1724, Mor. 16,808.

² 1 Ross' Lect. 156.

³ 31 and 32 Vict. c. 101.

at different times, the witnesses, although the same, subscribe each time as witnesses to the signatures of each of the parties. With the contents of the deed the witnesses have no concern, for it is the signature only which they attest.

3. **MODE OF ADHIBITING SUBSCRIPTION WHERE PARTIES CANNOT WRITE.**—When the lessor, lessee, or cautioner cannot write, he authorises [a notary or justice of peace] to subscribe for him. This he does by [authorising the notary or justice of peace] to subscribe for him, which authority must be given at the moment of subscribing [and before two witnesses]. The deed must be read over to him in the presence of the witnesses immediately before it is signed, which fact [must be] mentioned in the notary's docquet. [The docquet, for which a statutory form is now provided, must also set forth that the granter of the deed authorised the execution thereof.¹]

4. **ATTESTATION BY WITNESSES WHERE SUBSCRIPTION IS BY NOTARIES.**—Two witnesses are necessary. And the same rules are applicable to them as to witnesses where the party himself subscribes.

According to strict rule, the testing-clause ought to be written out before the deed is subscribed. And if the time and place are certain, and the parties and witnesses are assembled along with the writer of the deed, it will be the most advisable course, as precluding the chance of those inconveniences and even risks which may arise from the course ordinarily adopted. But as this certainty and co-operation are in many instances unattainable, such a course is seldom followed in practice, and a blank is ordinarily left for the testing-clause. A note of the names and designations is kept, and the testing-clause is subsequently filled up, usually by the person who wrote the deed, but occasionally by [387] another person, it being set forth in the testing-clause that such is the fact. The latter course is quite valid.

Art. 2.—
*Tenor of the
Testing-
Clause.*

The testing clause sets forth—

1st, The fact that the deed was subscribed by the parties.

2d, The name and designation of the writer of the deed. [But this is not now indispensable.]²

3d, The number of pages of which the deed consists. The testing-clause bears that the deed was written upon "this and the preceding number of pages" (as the fact may be) "of stamped paper." This is [not now]³ indispensable. Where the deed was

¹ [37 and 38 Vict. cap. 94. s. 41.]

² [38 and 39 Vict. c. 94, s. 38.]
³ [Ib.]

written upon one sheet of paper, it was held, [even before the Act of 1874,] that the omission to insert the number of pages in the testing-clause does not vitiate the lease.¹ Each page had formerly to be numbered, but the Statute 19 and 20 Vict. c. 79 (1856), section first, declared that "it shall no longer be necessary to mark the pages of any deed or writing by numbers, any law or practice to the contrary notwithstanding."

4th, The date under which term the time and place of subscribing are included.

5th, The names and designations of the witnesses, which is a statutory requisite [unless their designations are appended to or follow their subscriptions.]²

6th, The attestation of the marginal additions specifying that they were subscribed by the party, the pages upon which they are inserted, and the name and designation of the person by whom they were written. If there are in the deed any erasures or any parts deleted before it was subscribed, these erasures and parts deleted should be specified, by reference to the pages and lines upon which they occur, and by an enumeration or even a specification of the words deleted. The statement that they were deleted before subscription is essential, because if done after subscription the validity of the deed will be endangered. The contents of this part of the testing-clause may be deemed statutory.

Printed
leases.

Where, by reason of the number of tenants, a proprietor has often occasion to execute leases, recourse has been had to printed deeds containing the whole of the stipulations applicable to all the lessees upon the estate, but with blanks left for the insertion of the name, &c., of the lessee, the amount of rent, and other matter which it may be thought probable will be special in each instance. These blanks [388] are filled up in writing, and the name of the person who fills them up must be inserted. In other respects the execution of a printed lease is the same as that of one the whole of which is in manuscript.

Duplicates.

As a lease is a mutual contract, and as each party should be in possession of a deed regularly executed, duplicates will be requisite. Each duplicate should be executed with all the solemnities, for although (as shall afterwards be shewn) the contract, being mutual, will be binding if one of the duplicates be regularly executed although the other be not, yet it is obviously preferable to take care that neither is defective in any respect.

¹ M'Donald v. M'Donald, 1778, Mor. 16,956, Hailes 769.

² [38 and 39 Vict. c. 94, s. 38.]

SECTION V.—STAMP LAWS APPLICABLE TO THE CONTRACT OF LEASE.

Stamp-duties, it has been said, are of very great antiquity,¹ but in modern times they were first adopted by the Dutch in the 17th century,² afterwards by the French,³ and were introduced into England in 1693 by 5 Will. and Mary, c. 21. Small stamp-duties on leases were permanently imposed in England by 9 and 10 Will. III. c. 25.⁴ The introduction of stamp-duties into Scotland was by an Act of 10 Anne. And by 12 Anne, ses. 2, c. 9, s. 1 (1714), there was imposed the duty of sixpence upon every skin, piece, &c., on which a lease should be engrossed or written.⁵ This duty rose progressively during the last and present centuries by various assessments, each of which was in addition to all the preceding.⁶

The provisions of the various statutes are enforced by penalties. But the Acts do not render void deeds which are not properly stamped, but merely subject the parties to the penalties enacted to enforce the duty, and prohibit the deed from being given in evidence until it has been duly stamped.

[At the date of the previous edition of this work] the existing Stamp Acts were 55 Geo. III. c. 184 (11th July 1815), 13 and 14 Vict. c. 97 (14th August 1850), 16 and 17 Vict. c. 59 (4th August 1853), and 17 and 18 Vict. c. 83 (9th August 1854). Except with relation to the amount of duties, the 55 Geo. III. c. 184, was the governing statute, for by the 13 and 14 Vict. c. 97, the powers and provisions of the Statute 55 Geo. II. c. 184, were enacted as being in full force; and by the second section of the Statute 16 and 17 Vict. c. 59, and of the 17 and 18 Vict. c. 83, all the powers and provisions contained in any Act in force at [389] the respective dates of these statutes were enacted as being in force.

[The Act 55 Geo. III. c. 184, imposed certain stamp-duties set forth in a schedule, and applied to the enforcement of these all the powers, forfeitures, and penalties imposed by the preceding Stamp Acts.]

The tenth section enacts "that from and after the passing of this Act all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty,

¹ Ross' Lect. 134.

² Chitty on the Stamp Laws, p. 1. The references are to the first edition of Chitty's treatise. The second edition, although bearing his name, was not published until after his death.

³ 1 Ross' Lect. 135. Chitty, *ut sup.*

⁴ Chitty, *ut sup.*

⁵ Spottiswood's Styl. 407-9; 1 Bankt. xi. 46; 3 Ersk. ii. 21, and Note c; Ersk. Pr. (edit. 1802) Append. No. ii.; Tait on Evid. 145.

⁶ Ersk. Pr. *ut sup.*

Stamp Acts
prior to
1870.

In an action of damages at the instance of a tenant against the occupier of a conterminous subject, for having taken possession illegally of a part of the pursuer's tenement, it was shown that there had annually passed between the pursuer and his landlord writings in terms of which the pursuer was continued in possession from year to year. They consisted generally of an inquiry by the landlord whether the tenant intended to continue his occupation, with an answer by the tenant in the affirmative. All of them were unstamped, and it was ruled, disallowing a bill of exceptions, that being unstamped they could not be admitted in evidence.¹

Unstamped
assignment.

Fifth, An unstamped assignation of a lease is equally ineffective. A party alleged that certain effects pointed on a farm for the debt of the tenant belonged to him. He presented a bill of suspension of the intended sale, founded on an unstamped deed of assignation of the lease of the farm and stocking. The Court refused the bill, on the ground that the deed was not stamped.²

Obligation
to remove.

Sixth, An obligation to remove voluntarily at a period specified, [395] and without any process of law, does not require a stamp.³ For being a writing which is merely intended to carry into effect the stipulation in the lease without the necessity of action or warning, it must be taken as a part of the lease or as explanatory of the stipulation under it, and therefore, being otherwise probative, may be looked at though bearing no stamp.

This doctrine has been confirmed by a recent decision. A tenant who possessed a piece of ground under a lease duly stamped, was thereby taken bound to remove on a certain event at any Whitsunday during the currency, on receiving the customary legal warning. Intimation having been made to him in January that procedure at law was to be taken for his removal at the Whitsunday following, he granted an unstamped obligation by which he bound to remove himself at Whitsunday, and declared that the obligation was to be equivalent to a decree of removal. He raised a process of suspension and interdict against the proprietors, to bar them from molesting him in his possession. He pleaded that the letter by which he had bound himself to remove could not be looked at because it was not stamped as an agreement. It was held that the obligation to remove did not require a stamp, and the note of suspension and interdict was refused.⁴

¹ *Hutchinson v. Ferrier*, 4 March 1851, 13 D. 837, 23 Jur. 379; aff. 29 March 1852, 1 Macq. 196, 15 D. (H of L) 7.

² *Kincaid v. Love*, 19 Dec. 1835, 14 S. 188.

³ *Maclaren v. M. of Breadalbane*, 20 Dec. 1831 F.C. 136, 10 S. 163, 4 D. and A. 428.

⁴ *Bain v. Stewart*, 14 July 1852, 14 D. 1007, 24 Jur. 621.

97, and 17 and 18 Vict. c. 63. [These statutes, however, have been repealed, and substantially re-enacted in the Consolidation Act of 1870, which also substitutes more comprehensive provisions for those of the Act 23 Vict. c. 15, relative to agreements for leases.

[First, It is provided that an agreement for a lease or tack, or with regard to the letting of any lands, tenements, or heritable subjects for a term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack; but a lease afterwards made in conformity with such an agreement duly stamped is to be charged with the duty of sixpence only.¹

[Where the consideration or part of the consideration for which a lease is granted consists not of money, but of produce or goods, the value of the produce or goods is to be held a consideration, for which the lease is chargeable with *ad valorem* duty. Where a minimum or maximum sum is stipulated as the value of such produce or goods, or the conversion thereof into money at a permanent rate is provided for, either optionally or otherwise, this minimum or maximum or permanent rate of conversion is to be the standard for estimating the value of the produce or goods for the purpose of assessing the *ad valorem* duty.²

[A lease containing a statement of the value of such consideration or partial consideration, and stamped in accordance with such statement, is, "so far as regards the subject-matter of such statement," to be regarded as duly stamped, unless and until it is otherwise shewn that such statement is incorrect.³

[A lease or agreement for letting is not chargeable with duty in respect of any penal rent, or increased rent in the nature of penal rent thereby reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of an existing lease of or relating to the same subject-matter.⁴ Nor, when charged with *ad valorem* duty in respect of the original consideration, is it liable in duty in respect of a further consideration consisting of a covenant by the lessee to make, or of his having previously made, a substantial addition to or improvement of the subject let, or of any covenant relating to the matter of the lease.⁵

[No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease not exceeding the term of twenty-one years, granted by an ecclesiastical corporation, sole or aggregate, is liable in more than 35s. of stamp-duty.⁶

¹ [33 and 34 Vict. c. 97, sec. 96.]

² [Ib. s. 97, subsec. 1.]

³ [Ib. s. 97, subsec. 2.]

⁴ [Ib. s. 98, subsec. 1.]

⁵ [Ib. s. 98, subsec. 2.]

⁶ [Ib. s. 98, subsec. 3.]

able, both on principle and under the statutes. For it was said, *first*, That the Court could not exercise a discretionary power of relieving from the penalty the party on whom the law has imposed it (the user of the document), by ordaining another party to pay it. And that the penalty could not be enforced at all except at the suit of the public prosecutors named in the Act. And *second*, That the practice of superseding judgment was at variance with the true construction of the statutes.

[The rule now observed is that the expense of stamping an unstamped deed must be borne by the party founding on it in the first instance, but that if it is a mutual deed, such as a lease which both parties were bound to stamp, the expense as a general rule is ultimately divided between them.]¹

The [397] relative position of the parties will govern the question of liability, either for the expense of stamping, or other expense incurred previously to the plea of want of stamp. *1st*, As already indicated, a landlord who was *in petitorio* and founded on certain documents, was held to be obliged to have them stamped in the first instance at his own expense.² *2d*, An unstamped minute of lease was produced by a pursuer in the Inferior Court. It was founded on by both parties without the objection of the want of stamp having been seriously insisted on. A final judgment having been pronounced by the Sheriff, the Supreme Court, in an advocacy ordered the document to be stamped. It was held that the pursuer was not bound, before having it stamped, to pay the previous expenses of process; but there was reserved to the defender any claim competent to him by reason of the document not having been stamped at an earlier period.³

Tenth, Stamping has a retro-active effect, and validates the whole proceedings.⁴

Eleventh, The consequences of not having a stamp, or having an improper one, are—*1st* That until the defect be supplied the instrument cannot be pleaded upon or given in evidence. *2d*, The defect cannot be supplied by partial performance or acts of homologation. *3d*, The tenor cannot be proved if the instrument be lost; but the party may resort to other evidence, and therefore an admission upon the record, or upon a reference to oath, will prove what could have been proved by the instrument. But these results are

Effect of
post-
stamping.
Conse-
quences of
want of
stamp.

¹ [Neil v. Leslie, 19 March 1867, 5 Macph. 634. M'Donnell v. Caird, 19 July 1870, 8 Macph. 1012.]

² Grant v. Grant & Co., 16 Dec. 1837, F.C. 238, 16 S. 246.

³ Church v. Sharpe, 8 March 1843, 5 D. 876, 15 Jur. 364.

⁴ Wood and Mandatary v. Kerr, 13 Nov. 1838, F.C. 12, 1 D. 14, 11 Jur. 36. Davidson v. Douglas, 13 Nov. 1838, F.C. 7, 1 D. 10, 11 Jur. 36. Mories v. Glen, 24 Nov. 1843, 6 D. 97, 16 Jur. 88.

Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security :

In respect of such consideration

{ The same duty as a conveyance on a sale for the same consideration

Where the consideration or any part of the consideration is any rent :

In respect of such consideration :

If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :

| | If the term is definite, and does not exceed 36 years, or is indefinite. | If the term being definite exceeds 36 years, but does not exceed 100 years. | If the term being definite exceeds 100 years. |
|--|--|---|---|
| | £ s. d. | £ s. d. | £ s. d. |
| Not exceeding £5 per annum | 0 0 6 | 0 3 0 | 0 6 0 |
| Exceeding— | | | |
| £ 5 and not exceeding £10 | 0 1 0 | 0 6 0 | 0 12 0 |
| 10 " " 15 | 0 1 6 | 0 9 0 | 0 18 0 |
| 15 " " 20 | 0 2 0 | 0 12 0 | 1 4 0 |
| 20 " " 25 | 0 2 6 | 0 15 0 | 1 10 0 |
| 25 " " 50 | 0 5 0 | 1 10 0 | 3 0 0 |
| 50 " " 75 | 0 7 6 | 2 5 0 | 4 10 0 |
| 75 " " 100 | 0 10 0 | 3 0 0 | 6 0 0 |
| 100 | | | |
| For every full sum of £50, and also for any fractional part of £50 thereof | 0 5 0 | 1 10 0 | 3 0 |

(3) Of any other kind whatsoever not herein-before described, . 0 10 0 '
And see sections 96, 97, 98, 99, 100.¹

[392] In Scotland there have occurred numerous cases under the Stamp Acts applicable to leases, either directly or by close analogy

Art. 2.—
Execution
of the
Statutes in
Scotland.

First, By the 12 Anne, c. 9, it was provided (sec. 24) that when more than one matter or thing was engrossed upon one sheet of paper, the duty should be payable for each of them. And (sec. 25) when any matter or things were, contrary to the meaning of the Act, written on any paper not duly stamped, the sum of £5 should be payable respectively for each of the said matters—until payment whereof the said matter should not be given in evidence nor admitted into any court. A lease of lands had been granted, and had been written upon stamped paper; and afterwards the same lessor granted to the same lessee a lease of other lands, which was written upon the same paper with the former. In a reduction of both leases it was argued that, in terms of the statute, the leases were written upon paper not duly stamped, and consequently were

Of two
leases on
the same
stamped
paper, the
first only is
valid.

¹ [See above, pp. 406, 406.]

not probative till the sums were respectively paid for each of them. But the lessee having insisted on the validity of the lease first in date only, pleading that having been written on stamped paper it was good, and could not be annulled by another having been afterwards written upon the same paper, the Court sustained the first lease.¹

All the paper on which a deed is written must be stamped.

Second, The second half of one of the sheets of stamped paper on which a lease was written had been removed and had been replaced by an unstamped half-sheet, introduced immediately after the half which remained, and on which the stamp was impressed. It was held that the lease was not duly stamped.²

Third, Under the 12 Anne, c. 9, sec. 21; 6 Geo. I. [393] c. 4; and 30 Geo. II. c. 19, it was decided³ that an obligation to grant a lease, being equivalent to a lease, must be stamped; but what is styled an obligation was in reality a deed (as the report shews), and therefore it was requisite that it should be duly stamped. Had it been merely an agreement to grant a lease, no duty would have been exigible as the law then stood.

Fourth, It was decided under the same statutes that if an obligation is in the form of a missive letter, stamping is not necessary.⁴ But the contrary was afterwards ruled in several cases. By the Stamp Acts prior to 23 Geo. III. c. 58, stamps being required for indentures, "leases," bonds, or deeds, and for all agreements, "whether they shall be the only evidence of the contract, or obligatory upon the parties from their being written instruments," the Court decided that mutual missives with relation to the sale of a house must be stamped.⁵ The duty necessarily was the agreement-duty. This was a case of sale, but the same rule is applicable to leases, as coming equally under the intendment and terms of the statute. The fourth section of the 23 Geo. III., by exempting agreements for leases under a certain yearly value, clearly involved the application of the agreement-duty to those above that value, which construction is confirmed by the [schedule to] 55 Geo. III. c. 184. In consequence, the agreement-duty, and not the *ad valorem* duty, was practically held to be exigible for obligations or agreement to grant leases.⁶

¹ *Ross v. Steven*, 1749, Mor. 16,935.

² [*Nicol v. Fraser*, 11 March 1841, F.C. 874, 3 D. 890, 13 Jur. 538. [Cf. *Robson v. Hall*, Peake 128. *Copley v. Day*, 13 East. 241. *Powell v. Edmunds*, 12 East. 6.]

³ *Macdonald v. Macdonald*, 1776, Mor. 16,956, Hailes 789.

⁴ *Mathison v. Duff*, 1777, Mor. 16,942.

⁵ *Rollo v. Reid*, 1787, Mor. 16,944. *Tait on Evid.* 145.

⁶ [*In Hutchison v. Ferrier*, *infra*, it was said in the House of Lords that agreements to grant leases in Scotland are leases, and "require to be stamped as leases." But under the present law no difficulty can arise, as it has been seen that the stamp-duty for leases applies to all agreements for letting.]

Under the Stamp Act, 55 Geo. III. c. 184, a contract of lease being unstamped, the Court refused to allow it to be pleaded upon.¹ In a series of cases under the same statute, the rule was laid down, and uniformly acted on, that a missive of lease must be stamped, and that, if unstamped, it cannot even be looked at by the Court. In an action of removing, founded on an unstamped missive, the tenant was ordered in the Inferior Court to find caution for violent profits as a condition of giving in defences. A copy only of the missive of lease was produced. In a suspension, the Supreme Court ruled that the order was bad; for that, even if the missive had been produced, still so long as it was unstamped the Judge could not have looked on it, and that the utmost he could have done would have been to sist process.²

Unstamped agreement or missive not admissible in evidence.

So, a landlord in an application for interdict against his tenant founded on missives of lease, and on a relative submission and award, which submission had been entered into in terms of the missives, and for the purpose of explaining [394] them. The tenant pleaded on the import of these documents, and also raised a reduction of the award as being *ultra vires*, and as being unstamped. The Court ruled that as the landlord was *in petitio*, and founded on all the documents, all of them, the missives included, must be stamped, in the first instance, at his expense.³ And in an action to reduce, on the ground of its having been fraudulently impetrated, the renunciation of a lease constituted by missives, it was held that the missives, being unstamped, could not be produced in evidence.⁴ In a subsequent case the rule was dealt with as undoubted.⁵

A case, which is apparently obstat, admits of an explanation. A party in possession of a farm under an unstamped missive of lease was charged during the currency, under a decree to remove, for not finding caution in terms of the Act of Sederunt. In a suspension he pleaded that the missive was not stamped. The Court remitted to the Sheriff to proceed in terms of the Act of Sederunt. The charger argued that the objection of want of stamp had not been stated in time; but meanwhile he had the missive duly stamped, by which the objection was obviated.⁶ After the Statute 13 and 14 Vict. c. 97, was passed, and by virtue of the included operation of the Statute of 55 Geo. III., the general doctrine was confirmed.

¹ McNiven v. Leith and Gray, 10 March 1836, 14 S. 685.

² Ross v. Webster, 18 Jan. 1834, 12 S. 308.

³ Grant v. Walker, Grant, &c., 16 Dec. 1837, F.C. 238, 16 S. 246.

⁴ Summers and Son v. Fairservice, 4 Jan. 1841, 4 D. 347.

⁵ Church v. Sharpe, 8 March 1843, 5 D. 876, 15 Jur. 364.

⁶ McNaughton v. Grahame, 22 May 1834, 12 S. 619.

pensation. 7th, Of an obligation to preserve the houses and fences, and of provisions for securing the lessor against neglect. 8th, Powers and provisions relative to marches. 9th, Thirlage and services. 10th and 11th, Provisions regarding operations upon the mosses for fuel and other purposes. 12th, Reservations by the lessor of the game and fish, privilege of sporting, mines and quarries, and woods, power of planting and making roads, together with provisions for compensating any injury sustained by the lessee in consequence of the exercise of these reserved powers.¹ *Second*, In another class of articles the order observed is—1st, Marches; 2d, Mines, quarries, roads, canals, &c.; 3d, Inclosing, planting, draining, &c.; 4th, Residence and mode of culture; 4th, Houses.² *Third*, In a third class the tenor is—1st, Duration and residence; 2d, Assignees and sublessees; 3d, Marches; 4th, Mode of payment of rent; 5th, Allowance for agricultural improvement; 6th, Houses; 7th, Fences; 8th, Terms of payment of rent; 9th, Regulations as to giving houses to cottars; 10th, Public and local burdens; 11th, Cropping; 12th, Thirlage; 13th, Fuel; 14th, Restrictions as to [402] selling lime, &c., dealing in spirits, &c.; 15th, Reservation of minerals, planting, &c.; 16th, Manure and fodder; 17th, Attendance upon the courts of the barony; 18th, Penalties for contravention of articles; (19th, Consists of provisions purely local;) 20th, Exclusion as tenants of persons exercising particular trades; 21st, Compensation by incoming to outgoing tenants.³

Art. 8.—
*Modes of
executing.*

1st, The articles must, in terms of the Stamp Act, 55 Geo. III. c. 184, be executed upon paper or parchment duly stamped, and paying a duty of £1, 15s., and a progressive duty of £1, 5s. additional for each of the additional quantities of words enumerated.⁴ 2d, A title is prefixed to the "articles and regulations," bearing that they have been settled by the proprietor, and that they are to be observed by the tenants upon the lands belonging to him, and that the leases shall be made to have relation to the articles. 3d, This title is followed by a declaration that the proprietor named and designed having judged it to be expedient that those who may become

¹ Articles and Regulations by the Earl of Aberdeen; Keith's Agricultural Survey of Aberdeenshire, 183, 190.

² General Regulations and Conditions by the late James Ferguson of Pitfour, Esq.; Keith's Agricultural Survey of Aberdeenshire, 190-200.

³ Articles and Conditions laid down by John Gordon of Cluny, Esq., for letting the Estate of Slains, Aberdeenshire.

Gordon v. Anderson, 15 Feb. 1833, 3 W. and S. 1-5.

⁴ [This statute was repealed by the 33 and 34 Vict. c. 97, which does not expressly mention articles of lease. The individual lease in which the articles are embodied by reference is of course subject to stamp-duty under the existing Act.]

tenants of his lands and estates in the counties specified should be regulated in the management of the farms by certain general rules to be referred to in the minutes of tack or leases to be entered into by them, does therefore, by that declaration, ordain and appoint the whole persons who shall become tenants of his lands, their heirs and successors, to observe the rules and implement the conditions underwritten. The articles are then numerically detailed.

Immediately after them is inserted a declaration that all the articles and regulations shall have the same effect as if engrossed in the leases to which they shall refer. This is followed by the ordinary clause of registration and testing-clause, and is subscribed by the proprietor before witnesses. And a docket is added bearing that the regulations were recorded, of a certain date, in the books of a certain court.¹ Where the articles are in this form they are subscribed by the lessor only, and not by the lessees, but they are identified by a precise descriptive reference in the individual leases.

4th, But a different mode may be adopted. After the title, and without any prefixed declaration, the articles may be detailed, and in conclusion there may be inserted—*first*, A clause of registration, bearing that the proprietor named and designed, and the persons thereunto subscribing, whose leases to those regulations refer, consent to the registration, and constitute procurators; *second*, A testing-clause, bearing that “these presents, written,” &c., were subscribed by the proprietor and by the lessees whose leases thereunto [408] refer, as above mentioned, before the witnesses mentioned in the said leases, and affixed and subscribed to their several names, upon those regulations.² 5th, According to another plan, the enumeration of the articles is followed by a declaration that the foregoing were the articles and conditions referred to in the several offers made by the lessees respectively for different farms upon the estate specified, of the dates “hereto annexed to their respective subscriptions.” The lessees subscribe immediately after this declaration. After their subscriptions there is inserted a declaration by the proprietor that the above are the general articles and conditions on which the leases upon the estate specified are granted by him and referred to therein, after which there are the ordinary testing-clause and the proprietor’s signature before witnesses. But the testing-clause does not bear that the document is written upon stamped paper.³ 6th, In the preceding instances the

¹ Articles of Earl of Aberdeen, *ut sup.*

² General Articles and Conditions, by Ferguson of Pitfour, *ut sup.*

³ Gordon v. Anderson, *ut sup.*

particular farms let and the amount of rents payable are not inserted, but occasionally, along with the articles, the farms and rents are specified, and the document regularly subscribed by the proprietor and by all of his tenants. A written, it more usually a printed, copy of the articles is delivered to each of the tenants. And *tit.* The principal document is put upon record.

**Art. 4.—
Form of
relative
lease.**

Each of the relative leases must be written upon the proper stamp, and be in all respects conformable to the ordinary rules necessary for rendering the lease a contract valid in itself as the articles, while they tend to uniformity and abridgement, cannot supersede the legal requisites. In the leases blanks are left for the name of the farm let, and of the lessee, and for the amount of the rent. The lease then sets forth that in consideration of the rent stipulated, and of the other prestations, conditions, stipulations, and reservations, specified and contained in a separate paper of general articles, subscribed by the lessor as relative to his leases of the particular estate, and to be held as part of the lease, and which articles were, of a certain date, recorded as a probative writ in the books of a certain court, has let, &c. And in the clause of warranty-reference is again made to the articles as obligatory upon the lessor. The lessee obliges himself not only to adhere to, obey, and perform the whole¹ articles, conditions, stipulations, and others contained in the general articles regarding the estate previously referred to, and held as part of the lease, and which of a certain date he had subscribed, but also to pay the rent specified. In the clause of mutual performance both parties agree to perform their [404] respective parts of the premises and of the separate articles. And in the registration-clause both parties consent to the recording of the lease, and of the separate articles as part of it. The testing-clause should bear that of the same date as that of his subscription the lessee had got a copy of the separate articles.² Should there be any special matter stipulated between the lessor and lessee, it should be inserted, if it be an obligation by the former, immediately previous to the clause of warranty, and if by the latter, immediately after the obligation to perform the general articles.

**Art. 5.—
Validity of
articles of
lease.**

The validity of articles joined with the relative lease, as creating a binding contract, appears, independently of authority, to be un-

¹ See a case where the lease validly referred only to part of the regulations. *Pratt v. Abercromby*, 18 Nov. 1858, 21 D. 18, 31 Jan. 9.]

² *Gordon v. Anderson*, *ut sup.*

questionable. Nothing more is requisite than that the articles to which reference is made should be authenticated by the regular subscription of both parties, if such be the form, or by that of the lessor, if he alone sign, combined in either case with an accurate description of the articles embodied in the relative lease.¹

The validity of this mode of dealing has been recognised by high authority. The cases relating to this subject are recent, and in the earliest of them discovered the estate was held by several tenants under separate and independent missives, in which certain printed "Articles and Regulations," laid down by the proprietor relative to the cultivation of the estate, were referred to as subscribed. A question, which need not be detailed here, arose out of one of those articles. An argument was maintained throughout upon the import of the articles, the landlord pleading that it was incumbent upon the tenants specifically to perform the positive obligations undertaken by them. On the part of the tenant an argument, independently of that upon the import, was maintained as to the "articles and conditions" not being obligatory upon the tenants, not because they were in their nature invalid, but in consequence of their having been abandoned, and of some of the tenants not having signed them. But a judgment upon that argument was rendered unnecessary by a decision in favour of the tenant upon the import of the disputed clause. Thus, although there was no express judicial recognition of the validity of such articles, their validity, viewed generally, does not appear to have been questioned.²

When, very soon afterwards, the validity of certain articles and conditions of lease was disputed, their general legality was not impugned; but the tenant pleaded that he had not subscribed them, that they were not in existence when he obtained his lease, and [405] that the reference to them in the missive was too vague and general to be binding upon him. When the case came before the Court of Session it had not been stated that the lessee had subscribed the draft of the lease; and the Court decided that the articles referred to not having been signed by the lessee, or even adjusted at the date of the missives, a general reference made to them in a certain offer was insufficient to render the regulations binding upon the lessee. Afterwards, evidence having been produced that the lessee had subscribed the draft of the lease, the Court recalled their judgment against the lessee's general liability under the articles; but decided in his favour upon the import of

¹ [Lyon v. Irvine, 13 Feb. 1874, 1 R. 512.]

² Bell's Pr. 1190. Gordon v. Robert-

son, &c., 11 March 1825, F.C. 748, 3 S. 656.

one of the clauses in which the main question (not here in point) was involved.¹ By this case, consequently, the rule was established that where it was proved that those articles are adopted by the lessee as part of the contract they are obligatory upon him.² The rule was sanctioned by the House of Lords; for, upon appeal, it was held (affirming the judgment of the Court of Session) that a landlord having drawn up certain "articles and conditions," and a tenant having taken a farm by a missive binding himself to the conditions of another tenant's missive, and having also signed a draft of a lease referring to them, and having possessed for the full duration of the lease, the tenant was bound by the articles and conditions, although the draft had never been extended, and although he had not signed the articles themselves. While the lessee relied upon special matter, he admitted that he would have been bound by the "mere regulations," the validity of which was, from the Woolsack, held to be undoubted.³

Accordingly it was in a subsequent case held to be quite certain that effect must be given to express stipulations in articles of lease, notwithstanding contrary local usage.⁴

While in these instances it was ruled that articles were obligatory upon the lessee, it has, *e converso*, been ruled that they were equally obligatory upon the lessor. For it was decided that a purchaser of lands was bound by articles of set (lease), according to which the lands were let, the articles having been signed by the former landlord and the tenantry, and containing a clause declaring that they should be as effectual as if engrossed in the leases; but in the leases themselves no reference was made to the articles.⁵ And in a subsequent case the validity of the articles was assumed and their import argued.⁶ If therefore articles are thus binding upon a singular successor when there exist the requisites which convert [406] the personal contract of lease into a real right, they are, as matter of personal contract, necessarily binding upon the lessor and his representatives.

SECTION VII.—WRITTEN OBLIGATION TO GRANT A LEASE, AND WRITTEN ACCEPTANCE.

When parties treat privately, the ordinary course is, after the duration, rent, and other stipulations and conditions have been

¹ Gordon v. Anderson, 1825, 4 S. 13.

² Dickson on Evidence, 110.

³ Gordon v. Anderson, 15 Feb. 1828,

3 W. and S. 1-19.

⁴ Gordon v. Thomson, 14 June 1831,
9 S. 735, 4 D and A. 131.

⁵ Macra v. Mackenzie, 7 June 1828,
6 S. 935.

⁶ Gaunmel and Davidson v. Anderson,
9 Dec. 1836, 15 S. 233.

verbally adjusted, that there are drawn up documents ordinarily termed "missive letters," which consist of an obligation upon the part of the proprietor to grant a lease upon the terms settled, and upon the part of the lessee of an acceptance and consequent counter-obligation to take the lease upon these terms. The obligation to grant constitutes the primary document. The ordinary tenor of it consists—*1st*, Of a statement that the parties had agreed concerning a lease of the subjects named; and *2d*, Therefore the proprietor obliges himself to grant a regular lease for a period, and for a rent, and under conditions specified. The clauses and obligations may either be embodied in terms, or there may be a declaration that the lease is to contain the same clauses and obligations as are contained in the current lease. The form is that of a letter addressed to the future lessee. And it is important to observe that in order to render that letter obligatory it must be holograph of the granter, or regularly tested.¹

Art. 1.—
Missive letters, or obligation and acceptance.

To the counter-obligation by the lessee there is prefixed a copy of the obligation to grant; the lessee declares that it contains the terms of the agreement concluded between the proprietor and him relative to a lease of the lands named; of those terms he accepts, and obliges himself to enter into a formal contract of lease when required.² His acceptance must also be holograph or regularly tested. Even though possession has followed upon these "missive letters," no action upon them will lie until they shall be stamped. And it is recommended that in every instance the lease should be regularly extended (engrossed) upon stamped paper previously to possession.³

A minute of lease embodies the mutual obligations in one document. It consists of—*1st*, The declaration of the constitution of a contract between the proprietor of the lands to be leased and the future lessee. *2d*, The grant to the lessee regulating the powers of assigning and subletting, the duration, and terms of entry. *3d*, [407] Warrandice. *4th*, Obligations by the lessee to pay the rent. *5th*, Stipulations relative to management, erections, preservation, and similar matters. And *6th*, Mutual obligations under a penalty of implement, and of executing a formal lease upon stamped paper containing the usual clauses. This document, like missive letters, must be stamped before action will lie, and it is recommended that, before possession, a formal lease should be executed.⁴

Art. 2.—
Minute of lease.

¹ 1 Jurid. Styl. 4th edit. 551-2.

² Jurid. Styl. *ut sup.*

³ Jurid. Styl. *ut sup.*

⁴ 1 Jurid. Styl. *ut sup.*

C acknowledged the subscription, and that, as it was covenanted that there should be a lease in writing, there was still *locus penitentie*.¹ And a lease which was defective in the statutory solemnities, as wanting the name and designation of the writer, and upon which there had been no possession, was reduced at the instance of the granter, although he acknowledged his signature.² *Third*, A postscript to a lease, written beneath the names of the witnesses, was found null, because wanting witnesses.³ And a lease, signed by the principal parties but not by the witnesses, being left thus incomplete in the hands of one of the two persons who were inserted as witnesses, he and the other, some days afterwards, put their names to the contract as witnesses at the instigation of one of the parties. The lease was held to be null; for the parties having broken up without perfecting their contract, they were free, and could not afterwards be bound but by a new act of their own, interposing their consent to the subscription of the witnesses.⁴ It may well be doubted if a doctrine so rigid would be adhered to in modern practice.

Art. 3.—
Incomplete-
ness from
absence of
signature
of party.

In mutual contracts entered into between one person on one side and two persons on the other, the one signing is not bound unless the two on the other side both sign also, unless it appear [414] from circumstances that the faith of one only of the two was followed, and that he is the party who signs. This rule is applicable to leases.⁵ On this principle, it was decided that where a lease was granted to a person and his son, the lease was effectual to the father against the granter although the son did not subscribe it, because the faith of the father only appeared to have been followed, and the insertion of the son's name appeared to have been rather a concession to the father than a stipulation by the granter of the lease.⁶ But where the faith of all the intended lessees has been followed, all of them must subscribe in order to render the lease obligatory upon any of them. Three persons proposed to take a lease, and the terms were settled. In the absence of one of them (who went to view the lands) two of them signed the lease. The third, disliking the lands, refused to sign. The two who had signed having determined to resile, an action was raised to compel them to implement, in which it was decided that the lease, not having been signed by one of the intending lessees, the deed was incom-

¹ Maitland v. Neilson, 1779, Mor. 8459, 17,054.

² McFarlane v. Grieve, 1790, Mor. 8459.

³ Kelly v. Innes, 1619, Mor. 16,876.

⁴ Hume v. Dickson, 1730, Mor. 16,898.

⁵ Per Lord Kilkerran in Hamilton v. Smith, 1738, Mor. 9168.

⁶ Hamilton v. Smith, *ut sup.*

Articles (of which the number and the nature must necessarily be arbitrary) are then inserted, embodying the clauses of management, erection, preservation, &c. 12th, Article relative to removal. 13th, Reservation by proprietor of mines, woods, right of making roads, &c. 14th, One-half, or any other proportion of the auctioneer's fee, shall be paid by the person preferred, and the other by the proprietor. 15th, Conditions that all questions relative to the articles shall be submitted to arbitration. 16th, Mutual obligation to implement by the exposor subscribing the articles and the offerers by subscribing their respective offers, each under a penalty, —clause of registration and testing-clause bearing that the articles are written upon stamped paper.

A regular statement of the proceedings, entitled "Minutes of Procedure," ought to be kept by the judge of the roup. If it be necessary, by reason of want of offerers or other causes, to adjourn the roup, there is inserted a statement bearing that the farm having been exposed to be let during the time, and at the upset price settled, in presence of the judge, in terms of the articles, and no offerer having appeared (or from other causes), the judge adjourned the roup until a day named. Should offerers appear, the minutes bear the amount of each successive offer. Each offer ought to be subscribed by the offerer and the judge, although this is occasionally avoided in practice. The last and highest offerer at the expiration of the time is declared by the judge to be preferred, and that offerer enacts himself accordingly, and obliges himself to implement the articles in every respect in so far as is incumbent upon the purchaser under the penalty specified, and he consents to the registration of that enactment and obligation along with the articles of roup. The subscription of the judge and the offerer are then formally adhibited.¹

Minutes of
procedure
at roup.

SECTION VIII.—RENTAL-RIGHTS OR RENTALS.

Besides the ordinary lease there is also known in law a description [409] of lease formerly used often, but now almost obsolete, called a rental-right. In treating of the powers of heirs of entail to lease, some of its characteristics were noticed.² The holders of these rights are styled rentallers or kindly tenants, by which latter term is indicated the reciprocal attachment deemed to subsist between them and their landlord. They are ordinarily deemed to

Art. 1.—
General
description.

¹ Jurid. Styl. 2d. edit. 76 *et seq.*, 3d edit. 92 *et seq.*, 4th edit. 86 *et seq.*

² Book I. chap. ii. sec. 1, p. 116.

have been the descendants partly of the villeyns, who had become free, and of the *liberi firmarii*. They had no charters, sasines, leases, or other rights to their possessions, but attended the courts of their overlords, and had their names, payments, and possessions entered in the lists of tenantry belonging to the barony or manor. They were possessors of the same class as the copy-holders of England. In Scotland the ecclesiastics made grants to the younger sons of barons at moderate rents, and, assuming them as kindly tenants, allowed them and their heirs to possess as long as they paid their rents. On the royal demesne, and on the estates of many of the great families, there were possessors of the same description. In some parts of Scotland, as on the lands of the archbishopric of Glasgow and the monastery of Paisley, they were styled heritable proprietors. And throughout Scotland there long existed an idea that the right was equivalent to a right of inheritance.¹ Subsequently (as shall be hereafter shewn) rental-rights with a certain exemption were brought by the Courts under the rules applicable to the contract of lease. When leases are granted to persons acknowledging or constituting them kindly tenants, they are "equiparate" to those which are expressly granted under the name of rentals; but it is indispensable that they either be expressly called rentals or that the lessee acknowledged is a kindly tenant.² The subject-matter of rentals may consist of lands and other ordinary heritages, and even of a mansion-house.³

**Art. 2.—
Form of
Rental-
right.**

Writing is essential to the constitution of a rental-right;⁴ and payment of rent, although for many years, will not be sufficient if there be no writ.⁵ The writing may be of two kinds, the force of each of which is very different. It may consist, 1st, Of a deed formally executed like an ordinary lease, and delivered to the [410] tenant; or 2d, Of an enrolment in the rental-book of the proprietor. The former is valid against singular successors, the latter only against the granter and his heirs.⁶

In the older Books a rental-right, by implication, appears to be

¹ Balfour 205, c. xviii; 1 Craig, xi. 24, and 2, ix. 34; 2 Stair, ix. 15; 2 Mackenz. Inst. vi. 9; 2 Bankt. ix. 41; 2 Ersk. vi. 37; 2 Ross' Lect. 478-81; Bell's Pr. 1279-81; 1 Jurid. Styl. 3d edit. 476. M'Kenzie v. Gullen, 1781, Mor. 10,311.

² Craig, Stair, Mackenz. Inst., Bankt., Ersk., Ross' Lect., and 1 Jurid. Styl., *ut sup.*

³ Duke of Lennox v. Houston, 1628, Mor. 15,184.

⁴ 1 Craig xi. 24; 2 Stair, ix. 18; Mackenz. Inst., Bankt., Ersk., and Jurid. Styl., *ut sup.*

⁵ Tutor of Cassilis v. Lochinvar, 1581, Mor. 15,183.

⁶ Stair, Ersk., Jurid. Styl., *ut sup.* 2 Bankt. ix. 41 and 44. L. of Aytoun v. Tenants, 1625, Mor. 7191, 16,476. Agnew v. E. of Cassilis, 1625, Mor. 15,189. Lady Langton v. Tenants, 1627, Mor. 15,184.

recognised; for it is laid down that "grassums do imply kindliness."¹ But this doctrine is justly rejected by the modern authorities, because grassums are now frequently given by tenants upon their entry, when neither the landlord nor the tenant means to constitute a rental.²

When a rental-right is to be formally executed, it consists of a declaration that the proprietor has received, admitted, and rentalled his lovite (named) as his kindly tenant for his lifetime in the lands specified, for payment of a certain yearly rent, with grassums and other services used and wont, but under the condition that it shall not be lawful for the rentaller to let, dispoise, or put away the lands or any portion of them under sanction of the nullity of the rental.³ This is the tenor of the right in its most simple form. But its conditions and terms may be more ample, and better defined. *First*, A definite period of duration may be inserted in place of the rentaller's lifetime. *Second*, It may contain an obligation that the houses and fences, &c., shall be kept in preservation. *Third*, There may be a clause of warrandice. *Fourth*, A declaration of irritancy and power to resume in case the rent shall not be paid may form a condition. And *Fifth*, There may be a declaration that all services are dispensed with, and that the rent shall be deemed to be in full of every demand. In its more ample form there is little difference between a rental-right and an ordinary lease.

But although the words rental or kindly tenant be inserted in a writing, it will not constitute the grantee a rentaller or kindly tenant if the general purport be at variance with such a legal character. Thus, a proprietor granted a writing that he "received and rentalled his niece as a kindly tenant for all the days of her life," reserving to two tenants their rights under their leases, but assigning their rents to his niece, who, besides paying rent, was bound to erect certain buildings. It was held that the niece was not properly a kindly tenant, but only the holder of a liferent lease, and that the tenants whose rights were reserved were not her subtenants, but that the landlord, being undivested proprietor, had a title to remove them on the expiration of their leases without the concurrence of the liferent lessee. The *gist* appears to have been, [411] and soundly, that it was not within the power of the proprietor to confer on the grantee the character and rights of a rentaller or kindly tenant, so as to interpose her between the granter and the existing tenant, to whom he had granted the lease.⁴

¹ 2 Stair, ix. 20.

² 2 Ersk. vi. 37.

³ 1 Jurid. Styl. 3d edit. 476.

⁴ Wilson v. Wilson, 21 Jan. 1859, 21 D. 309, 31 Jur. 164.

4th, Subscriptions by notaries come under the same rule. Thus, a lease which would have been null because signed by two notaries [when two notaries were necessary] upon different days, and not *unico contextu*, was found to have been validated by the lessee having entered into possession.¹

5th, On the same principle, a lease which otherwise would have been null from the want of the subscriptions of the witnesses, was held to be validated by the lessee's possession.²

Documents
signed, but
not holo-
graph.

6th, Validity is also held although the document is not holograph. Thus, a lease for five years entered into by mutual missives signed by the parties, but not holograph, was sustained.³ So, a missive letter of lease was sustained as effectual although not holograph, the subscription not having been denied, although not admitted, and possession having followed.⁴ And a tenant in possession made an offer by a missive letter which specified the terms and conditions of a lease for nineteen years, to commence on the expiration of the one then current. The landlord subjoined his acceptance subscribed, but neither holograph nor attested. The [418] lease was sustained. This decision, however, cannot be deemed to have proceeded on possession alone, as there was a special *rei interventus*, to be noticed hereafter.⁵

Documents
not dated.

7th, Although the document be not dated, it will be valid. Thus, a letter was addressed to a proprietor, a minor, by the former lessee, agreeing to accept of a lease of the same farm, and to pay a rent which was acknowledged to exceed the old rent in certain particulars. Possession took place. This transaction was found to be equivalent, as against the proprietor, to a lease, although the letter bore no date, because it was proved by the proprietor's declaration that the date of the letter was five years previous, and although his curator was not present at receiving the letter, yet he himself became major soon afterwards, and received for four years the additional rent agreed to in the letter, during which time, as he acknowledged, the letter formed the lessee's only title of possession.⁶

Written
promise of
lease.

A written promise of lease dated the day before the day of the sale of the lands was sustained against a purchaser. The promise was for fifteen years from Whitsunday 1786, and the tenants had been in possession from that term to November 1794, on the faith and expectation of a written title. The reporter says that this

¹ *M'Moran v. Black*, 1624, Mor. 16,830, 17,012.

² *Grant v. Grant*, 1763, Mor. 13,841-2.

³ *Duncan v. Barrow*, 1752 and 1753, Mor. 15,177, 16,984, Elch. h. t. 19.

⁴ *Grant v. Richardson*, 1788, Mor. 15,180.

⁵ *Campbell v. Macpherson and Campbell*, 1793, Hume 766.

⁶ *Gordon v. Hall*, 1767, Mor. 15,178.

was a nice point, but not necessary for the decision of the cause, the judgment in which proceeded on the purchaser's objection being barred by the articles of roup. The question was, however, argued with relation both to the granter of the lease and the purchaser.¹ Had it been necessary to decide the question mooted, the principle would apparently have been in favour of the validity of the lease. For if a lease clothed with possession be valid though there be no date, a lease dated subsequently to a long course of possession, and holding the commencement of the contract to have been contemporaneous with the commencement of the possession, may be deemed to be of equal efficacy, at least in a question with the granter.

8th, Original missives, stipulating for meliorations, could not be recovered. In an action at the tenant's instance for the value of the meliorations, there was produced a notarial copy of the missives which, before the landlord's death, had been delivered to the tenant by the factor. This was held, in a question with the landlord's representatives, to be a sufficient evidence that the pursuer, who had been in possession, held a lease.²

9th, It has been held that a valid lease may exist although the document said to have created it was not signed by either party. [419] Thus, a lease for thirteen years was found good on a written minute not holograph of either party, and which neither party had subscribed, possession and payment of rent having followed. The question was tried both with the granter and a party deriving right from him through an excambion. The omission of the signature is ascribed by the reporter to inadvertence, and not to any purpose of resiling on either part.³ The soundness of the decision may be questioned. There was nothing *ex facie* of the document which afforded proof of the intention of either party to contract. Strong real evidence of intention to contract, and that the incompleteness did arise from inadvertence alone, might perhaps be admitted to supply the defect; but it may be doubted whether there was such real evidence in the actual case. In a comparatively recent case a doubt has been expressed, not of the soundness of the preceding decision itself, but of the doctrine by which it must have been governed. The question was raised whether a lease extended on stamped paper, but signed by neither party, would have been valid (but for special circumstances) in respect of possession having followed upon it. A surrender of the

¹ *Sievwright v. Scott*, 1796, Hume 790.

² *Williamson v. Fraser*, 18 Feb. 1834, 12 S. 466.

³ *Duke of Gordon and Cuming-Gordon v. Carmichael*, 1800, Hume 806.

lease had been effected, so that it was unnecessary to decide the question; but it was said that power to hold a party as under a lease for years, where confessedly there was no signed or holograph writing by either party, may well be doubted.¹

A letter from a factor to a subfactor instructing to give possession.

A lease for nineteen years was sustained on a letter from a principal factor to a subfactor followed by possession and payment of rent. A verbal agreement took place between A, the principal factor, and B, for a lease of nineteen years. In consequence A wrote to C, a subfactor, a letter in which, specifying the rent, duration, and obligation to uphold, he instructed him to give possession to B, who entered into possession. Two years afterwards, the estate having been sold to D, he raised a process of removing against B, as possessing on a verbal bargain from year to year. B relied in defence on A's letter to C as equivalent to a lease for years. It was argued that there was not law to sustain, for a tack, a private and ordinary letter from a factor to a subfactor—a letter not expressly granted by the writer as factor, nor entered in any rental-book of the estate—not written at the landlord's special desire—not even addressed to the tenant—not accepted on his part in any such way as would have constrained him to continue the possession if he had inclined to leave it. But the lease was sustained by the Court.² And it was said that the estate was managed in an irregular way; but that among the several factors the business [420] was done, though none of them had full powers by himself; and that the letter bearing terms of tack and written to the persons who had the power of admitting to possession, was such a title as is good when followed by possession. The soundness of the decision overruling the plea of the pursuer may be questioned as a matter of law, and as the case is certainly peculiar it will not probably be drawn into a precedent. [It has since been held that a letter from the husband of a proprietrix to the surveyor of taxes, to enable him to complete the valuation roll, was sufficient evidence of an agreement for a nineteen years' lease, to be supported by proof of *rei interventus* and possession.³

Advertisement and offer with possession.

10th, Where documents, though informal, contemplate prospective arrangements which necessarily imply a duration for years, there will be a valid lease if possession has followed. A landlord advertised a farm to be let for eighteen years, and a party made an offer in reference to the advertisement, containing various conditions necessarily indicating a lease of considerable duration, but

¹ Per Lord Moncreiff (Ordinary) in *Girdwood & Co. v. Wilson, &c.*, 13 May 1834, 12 S. 576.

² *Arbuthnot v. Reid*, 1804, Hume 815.

³ [*Emalie v. Duff*, 2 June 1865, 3 Macph. 864, 37 Jur. 457.]

the precise term was not specified. The offer was accepted and considerable repairs were made, and possession for some years followed, during which the tenant continued to pay rent. Afterwards the tenant raised an action of declarator, concluding that the offer or missive of lease was not binding on him as a lease for a term of years, as it did not specify any term of duration, and therefore that he was entitled to bring the lease to a close at any time after giving reasonable notice. It was observed on the Bench that if an agreement fairly made in this manner could now be cast loose the effect would be to upset a large number of subsisting leases. And it was held that a valid contract of lease for eighteen years had been completed although no written lease was ever extended, and although the missive of offer did not *in gremio* specify any definite term of duration.¹ So a minute of lease for nineteen years was executed in 1825. It contemplated the subsequent extending of a more full minute or agreement, a certain rise of rent in 1831, and a new mode of computing that rent. In 1828 a more full minute was extended, specifying, *inter alia*, the precise mode of computing the increase of rent in 1831. The mode was conformable to the plan of the leases of a certain great proprietor in the neighbourhood, but there was in one particular a deviation from the exact terms of those leases. It was admitted by the tenant that the object of the parties in signing the minute of 1828 was to carry into effect the declaration contained in the minute of 1825, that the latter should be properly written out. The tenant signed the minute of 1828 and took a copy of it. He made no objection to its terms until 1831, when he averred that it differed materially from the minute of 1825, and that it had been unwarrantably impetrated from him. But the result of his averments was deemed [421] only to be that he had not sufficiently adverted to the precise terms of the document. It was held that the minute of 1828 was binding, because there was no deviation in it from the substance of the minute of 1825, and because the tenant had signed it, taken a copy of it as his title of possession, and possessed under it without objection for several years.²

11th, While possession has been held to cure defects, the gist of which consists mainly of informality, it has been held to have the same result where the defects attach more nearly to the substance. A holograph missive did not expressly bear to be a lease of the subjects, did not sufficiently specify or identify them, did not contain an acceptance by the person to whom it was addressed, did not

¹ *Russel v. Freen*, 14 May 1835, F.C.
436, 13 S. 752.

² *Carruthers v. Thomson*, 11 Feb.
1836, 14 S. 464.

Documents
defective in
specifying
substance.

Memorandum in landlord's pocket-book.

contain a sufficient stipulation as to the rent or term of payment, while the rent mentioned might be deemed elusory. If followed by possession, such a document was held not to be objectionable, but to contain all the essential qualities of a lease, and to be sufficient to give a real right.¹ It has been said that even a memorandum in the landlord's pocket-book mentioning the "duration" of the lease, if followed by possession will be sufficient to constitute a lease, and that there are more than one decision to this effect, although none of them are reported.² A detail of the circumstances of the cases, or at least of the full tenor of the memoranda, would have been satisfactory; for the doctrine as stated appears to indicate too great latitude. Although inserted in a memorandum-book, a holograph detail of the rent, duration, and other principal stipulations, might be as valid as if contained in any ordinary document, because it would shew the existence of a completed contract. But a memorandum of "duration" alone indicates rather that a communing was going on, and that one of the stipulations had been adjusted, but that the others had been left open for farther discussion. So, a course of cropping in the handwriting of the factor, an entry in the factor's books of the cost of preparing "the tacks," receipts for rent, and for the tenant's proportion of certain public burdens, a letter written by the landlord to the tenant with relation to a mill (part of the subjects) declaring that he would support an action to enforce thirlage, and an assignation by the lessee to his son of the lease during the future currency, alleged to have been made with the landlord's consent, were matters said to have been held sufficient, when followed by possession, to create a valid lease.³ The first two articles are immaterial; the effect of the third will depend upon the fact of the receipts being in the handwriting of [422] the landlord or not, but which fact is not stated; and the effect of the last will turn upon the proof of the fact of the landlord's knowledge; but the fourth article (the letter by the landlord) involves a direct recognition of the lessee's right under a finished contract, and when followed with possession seems sufficient.

Excambion between lessor and lessee.

12th. Where sufficient real evidence existed of an excambion between a lessor and a lessee relative to an inconsiderable portion of certain subjects which were held under a lease for ninety-nine years, it was decided that the lessee had a right of lease in the portion acquired by the excambion, which was good against a purchaser of the lessor's estate.⁴ The case is so circumstantial, and so

¹ Burnet v. McKimling and Forbes, 27 Nov. 1835, F.C. 53, 14 S. 74.

² Bell on Leases, 307-8.

³ Ramsay v. Ogilvy, 1802, n.r., but noticed in 1 Bell on Leases, 308-9.

⁴ Kennedy v. Carlyle, 22 Nov. 1836, 15 S. 102.

much weight appears to have been given to the fact that the subject was of small value, that it is difficult to deal with the case as one by which general doctrine is established. But perhaps the doctrine may be elicited that, where an excambion has been made, and possession by the lessee has followed, the subjects thus acquired by him come under the contract as effectually as did the subjects originally leased; and therefore that although there is not *ex facie* of the lease a title applicable to the subjects acquired by the exchange, there is a valid contract, not only as against the lessor and his heirs, but even as against a singular successor.

13th, Possession and *rei interventus* operating *unico contextu* have been held to validate. An iron company and a proprietor of minerals entered into an informal "general agreement as to a lease of minerals," by which "twelve months to be allowed to prove the field, and twelve months additional to sink pits and erect machinery" before the payment of the rent was to begin. The field was entered on, and bores were made. The result was not communicated to the landlord. More than six months after the commencement of the third year of the lease, intimation was given by the lessees of intended renunciation. The lessor having sued for the rent, it was held that the informal missive was validated, for that under it possession of the field had been taken and retained for the purpose of boring, and that there had been boring, and consequently *rei interventus*.¹

14th, The possession must be distinctly ascribable to the document, the informality of which it is pleaded as curing.² A lease was held under the Commissioners of Annexed Estates for a specified period and a liferent. An application was made by the liferentrix for a new lease, upon her renouncing her liferent to herself, and failing her, to her daughter and her heirs. The Commissioners declared that they proposed to grant the lease prayed for "on the [423] usual conditions." No formal lease was executed, and there was no possession. The estate having become the property of a singular successor, the lease was held not to be obligatory on him.³

This judgment must have proceeded on the doctrine that though possession had existed under the liferent lease, it could not be deemed to be so constituted as to be ascribable to the new lease embodied in the minute. For according to the analogy of the precedents, that minute, if it had been followed by possession, might well have been deemed to have constituted a lease. Much, however, depends on the precise phraseology of the minute, which

¹ *Sinclair v. Moesend Iron Co.* 22 Dec. 1854, 17 D. 258, 27 Jur. 105. See below, p. 441.

² [*Sinclair v. M'Beath*, 16 Dec. 1869, 6 Macph. 273.]

³ *M'Lean v. Cameron*, 1796, 3 Pat. 474.

is not given, for it may be doubted that if the tenor was that the Commissioners proposed to give a new lease, whether that would or would not have amounted to the basis of a contract which possession would validate.

Offer and facts inferring acceptance.

[15th, A valid lease for years was held to be constituted by a written offer from the tenant stating rent and ish, along with facts inferring acceptance on the part of the landlord, and followed by possession and expensive operations on the part of the tenant.¹

Draft lease and rent intervenient.

[16th, A draft lease adjusted between the parties in all essentials, and followed by outlay by the tenant that could only be referred to a lease for years, has been sustained.]²

Art. 2.—
Cases where possession does not cure informality or defectiveness.

Memorandum in landlord's ledger.

There are cases in which it has been held that informality or defectiveness is not cured by possession.

1st, It was held that a memorandum of a verbal set on the margin of the landlord's ledger did not make a written title, although followed by possession. In a process of removing the tenant defended himself on the ground that he possessed under a written title or memorandum, for fifteen years from Whitsunday 1802, which was entered in the landlord's writing in his rental-book. On a reference to his oath, the landlord deposed that he never kept a rental-book, but only a ledger of his accounts, and in that ledger, where the tenant was charged for the rent of his farm, there was on the margin an entry meaning that the verbal settlement with the tenant commenced in 1802 and terminated in 1817. The Supreme Court affirmed the judgment of the Inferior Court, repelling the defence and decerning the tenant to remove.³ The learned reporter approves of the decision, on the principle that it is right, if possession has followed, to hold that there is a lease for years where the writing, irregular or unshapely as it is, appears to have been intended by the parties at the time as a permanent evidence of a finished agreement; but that it would be against all principle (and that length the Court has never gone) to sustain, to the same effect, some brief note or memorandum made by the landlord for his own private use, or some transient and incidental mention of terms of set in a writing destined for some quite different purpose, as, for instance, an ordinary receipt for rent.

Receipt for rent, and marking in rental by factor.

[424] 2^d, A factor granted a receipt for rent, which bore *per* new agreement made with the proprietor for nineteen years. The tenant possessed for eleven years and paid an increased rent. His

¹ [Forbes v. Wilson, 22 Feb. 1873, 11 Macph. 454.]

² [Bathie v. Lord Wharmcliffe, 6 March

1873, 11 Macph. 490. Sinclair v. Macbeath, *cit.*]

³ Maxwell v. Grierson, 1812, Hume 849.

farm was stated, in a rental of the estate written by the factor, as being held under a new agreement for nineteen years. But the factor was not empowered to grant leases, and the landlord judicially denied that he had ever made such an agreement with the tenant, or was informed that the factor had done so, or that he ever gave him powers to that effect. It did appear, however, that the factor had in some instances given leases which were implemented by the landlord; but the learned reporter says, "holding the receipt as signed by the landlord, it still did not state the new agreement as a written one, and took notice of it incidentally only in describing a payment of rent. It did not bear any words, obligatory, or giving, or granting. On the whole, it could not fairly be construed as destined to do more than discharge distinctly, and somewhat at large, a particular year's rent." In a removing the Court repelled the defence founded on this document and the subsequent possession.¹ The decision would undoubtedly be sound, in accordance with the doctrine ruled in similar cases, if rested on the ground of the factor's want of power. But if the case be considered on the assumption that the landlord himself had signed the receipt, it seems to be difficult to reconcile the judgment with the doctrine embodied in the series of cases which have been detailed. [It was again held that a receipt for feu or rent is not a sufficient foundation for *rei interventus* to establish a long lease.]²

3d, Possession will not cure defect of power in the granter, or the absence of acknowledgment by the granter of the existence of a document to which the possession is referable. A factor having no power to lease for more than one year, agreed to grant a lease, and possession followed. The lessee claimed under an alleged lease for seventeen years, relying upon a letter written by himself, and delivered to his own agent, which bore that such was the duration. It was decided that no right to a lease for seventeen years had been established, and a charge upon a decree of removing was accordingly enforced.³

4th, A addressed a missive offer of lease, at a specified rent, for nineteen years, to B, the commissioner of C. B wrote to D, the factor, desiring him, if he had not a higher offer with undoubted security, to accept the offer of A, to read the commissioner's letter of acceptance to him, and to extend a lease on his finding security. The rent mentioned in the letter was higher than that contained in the offer, and the stipulation for security applied, not to a limited number of years, but generally. The security was never found,

¹ Campbell v. Robertson, 1797, noted by Hume in Maxwell v. Grierson, *ut sup.*

² [Gowans' Trs. v. Carstairs, 18 July 1862, 24 D. 1382, 34 Jur. 700.]

³ Sharpe v. Napier, 1823, 1 S. 477.

Offer and letter by landlord to factor conditionally accepting

and it was admitted by A that the letter was never read to him by [425] D, and that no lease was ever entered into. A was allowed to go into possession in the expectation that he might comply with the conditions and then obtain a lease. He possessed from year to year on this footing, and paid the rent which he had offered. Ultimately he fell in arrear. Meanwhile the missive of offer remained in the hands of B. At the end of six years a decree of removing was obtained against A, on the footing that he merely occupied from year to year. In a reduction of that decree, raised four years afterwards, A subsumed that he held a good contract of lease for nineteen years, and that he had been irregularly removed. The defender was assolizied, on the ground that under the circumstances the possession was not referable to any finished contract for a lease, and therefore that it was not competent to remove A as a tenant at will.¹

5th, A party sued as a lessee for seven years on an unstamped missive, not signed, as accepted by the party suing. He alleged that he had performed some acts of possession, such as delving up the garden which formed part of the subjects let, and planting vegetables in it, and depositing his working utensils in the house. These alleged acts were held to be irrelevant and insufficient; but the decision of the case did not turn on them, as the pursuer had in the Inferior Court restricted his claim to a lease for one year, which had expired before this action was brought.² Had the insufficiency of the acts of possession formed the *gist*, there might have been reason to doubt the soundness of the judgment.

Art. 4.—
Effect of
rei inter-
ventus.

Rei interventus operates the same cure as does possession, and upon the same principle. In order that *rei interventus* may operate, there must be a concluded contract, and so *consensus in idem placitum*. A person made an offer in August for a farm, by a letter addressed to the landlord, "on conditions explained by you." The agents of the landlord sent a draft of the lease to the offerer. Along with it they sent a note stating that the rent in the lease was less than had been agreed on, but that the landlord would explain the reason of that when they met. An application was made by the landlord's agents to those of the offerer requesting them to return the lease, which application was renewed. In October, being some time afterwards, the offerer's agents returned it to be extended. The landlord's agents then proposed to insert further conditions, and to reduce to writing certain matters which

¹ Cairns v. Gerrard, 18 June 1833, 11 S. 737.

² Gower v. Mackay and Clelland, 11 Dec. 1834, 13 S. 177.

had been verbally agreed on. Meanwhile the offerer had made purchases at the displensing sale of the outgoing tenant, and ordered implements for the [426] farm. The offerer having taken possession of the farm, the landlord applied for an interdict against him. *Rei interventus* having been pleaded, it was held that it did not [apply] because there was no true *consensus in idem placitum*, and therefore no concluded, although informal, contract which could be validated by *rei interventus*; and an interdict was granted.¹

In some of the cases noticed under the second article of this section, *rei interventus* and possession were combined,² and in some of them possession is styled *rei interventus*.³ The combination may be frequent, but in some instances there may be *rei interventus* without actual possession; while in others the effect may be ascribable principally to the *rei interventus*. On this principle, it was found that a missive of lease for a term of years, signed, but not holograph nor attested, was validated by the furnishing of two securities.⁴ So it was held that improvements made upon land in contemplation of a lease will give effect to an irregular missive, although no possession has followed upon it.⁵ And a lease for nineteen years, verbal as to the period of duration but proved by a written missive as to the rent and lands, was sustained, because there had been *rei interventus* by payment of a grassum and the erection of a house and offices by the lessee.⁶

Rei Interventus and possession together.

But *rei interventus* so strong as to imply consent must be established. In consequence, a missive of lease in which the period of duration was not specified, although attempted to be otherwise made out, was found to be good for a year only, no sufficient *rei interventus* having taken place. The *rei interventus* alleged consisted of outlay upon the farm-steading and inclosures, &c. But the answer was deemed conclusive that no improvements, if any, were made other than what might have been expected under an annual agreement.⁷

Rei Interventus must be strong enough to infer consent.

The *rei interventus* may be by either party, and so there may be *rei interventus* by the landlord, which bars the tenant from resiling. After a communing, the terms of a lease of a quarry for a year

Rei Interventus may be by either party.

¹ Fraser v. Brebner, 10 Feb. 1837, 19 D. 401.

² Countess-Dowager of Moray v. Stewart, 1762, Mor. 4392. Grieve v. Pringle, Drummond v. Scott, *ut sup.* See above, p. 437.

³ Ross v. Ross, Duke of Gordon and Cuming Gordon v. Carmichael, *ut sup.*
⁴ Campbell v. M'Pherson and Campbell, 1793, Hume 786.

⁵ Murdoch v. Moir, 8 June 1812, F.C. 692.

⁶ Macdonald v. M'Whirter and Gray, 18 Dec. 1810, F.C. 86.

⁷ Clark v. Lamont, 27 Jan. 1816, F.C. 72. [See Fowle v. M'Lean, 18 Jan. 1868, 6 Macph. 254. Sinclair v. M'Beath, 19 Dec. 1868, 7 Macph. 273 (where, and in Bathie, *supra*, p. 438, the effect of a signed draft as a title for *rei interventus* is considered).]

CHAPTER VI.

WRITING.

That the lease must be in writing is the first statutory requisite. Although this rule is not in terms set forth in the statute, it is clearly implied, and so the statute has been invariably construed.¹ On the description and tenor of the documents, formal or informal, by which the contract can be constituted, it is needless to add to the matter stated under the preceding chapters, to which reference is accordingly made.²

Informal
writings
valid if
followed by
possession.

Although the writing be informal, it will be valid against a singular successor, as against the grantor, if possession shall have taken place. The parties to a lease having, conformably to the English practice, signed but one side of it, the extract of the duplicate, signed by the lessee, was held sufficient.³ Thus, an obligation [433] to grant a lease, possession having followed, was found to be binding upon a singular successor who had purchased the lands.⁴ And where a lease had not been signed by the lessor, but possession had followed upon it, and the lessor had encouraged the lessee to lay out money upon improvements, and had taken the increased rent stipulated, the lease was, by the House of Lords, reversing the judgment of the Court of Session, held to be obligatory upon his widow, to whom, by her marriage-contract, there had been provided by locality a liferent right previous in date to the lease.⁵ So, a letter addressed to the widow of a lessee, assuring her that she might depend upon possessing the farm and grounds which her husband held at the time of his death at the rent he had then paid as long as she pleased, was held to constitute a liferent lease obligatory upon a purchaser.⁶ And a purchaser was also held to be bound by an offer for a lease drawn out in the handwriting of the landlord's factor, and signed by the tenant who at the time was in possession of the farm.⁷ A written promise of lease, dated the day

¹ Balfour, 202; 2 Craig, x. and 13; 2 Stair, ix. 4; 2 Mackenzie's Inst. vi. 5; Mackenzie's Obs. 37-9; 2 Bankt. ix. 5; 2 Ersk. vi. 24, and 3 Ersk. ii. 2; 2 Ross' Lect. 475; 1 Bell's Com. 65; 1 Jurid. Styl. 3d edit. 665-6; Menzies' Lect. 822. Keith v. Johnston's Tenants, 1636, Mor. 8400. Leith v. Stewart, 1776, 1 Hailes 174.

² *Supra*, chap. iv. of this book, p. 371.

³ M. of Montrose v. Walkinshaw, 1706, Mor. 13,615.

⁴ Garrock v. Forbes, 1750, Mor. 15,177.

⁵ Countess - Dowager of Moray v. Stewart, 1772, Mor. 4392, 15,179, Hailes 485; rev. 1773, Mor. 4396, 2 Pat. 317.

⁶ Skene v. Spankie, 1790, noticed 1 Bell on Leases, 313-14, Note c.

⁷ Drummond v. Gow, 1779, noticed Bell on Leases, *ut sup.*

before the sale of the lands, but clothed with possession, was sustained against a purchaser.¹ So a lease for thirteen years, constituted by a written minute, not signed by either party, but followed by possession, was found good against a party who had acquired by excambion.² And from a circumstantial case the doctrine may perhaps be elicited, that where an excambion has been made between the lessor and lessee, and possession has followed, the lands thus acquired come under the contract of lease, and that though there is no express title to them the contract may be valid against a singular successor.³ A lease for nineteen years was sustained against a purchaser, on a letter from a principal factor to a subfactor, having been followed by possession and payment of rent.⁴ And a holograph missive of lease, although of an unusually imperfect and defective character, especially with relation to the specification of the subjects, acceptance, and stipulations as to rent and term of payment, was held to contain all the essential qualities of a lease, and to be sufficient to give a real right if followed by possession.⁵

Leases of urban subjects come under the same rule. A missive letter not [434] holograph, and subscribed by the grantor's initials only, but the address adhibited in his presence, was sustained against a purchaser as a valid lease for two liferents, because it had been followed by possession.⁶ But (while the general rule was conceded) it was decided that missives by which a lessee obtained a lease of an urban tenement for one year and an obligation upon the lessor to grant a lease for seven years, if required, were not effectual as a lease for seven years against a singular successor. The grounds of the decision were, that there was no finished agreement except for one year, at the end of which the lessee might have quitted possession; that upon that finished agreement he possessed by tacit location, and that he had a further personal obligation, upon the lessor giving an option to obtain a lease for seven years, but as the lessee had not made the requisition before sale, his right to do so was ineffectual against a singular successor.⁷

The judgment of the House of Lords, to which reference has been made, has been apparently questioned, as having rendered the law of the constitution of lease uncertain.⁸ While its soundness is

Examples
in urban
subjects.

Courtesy of
Moray v.
Stewart,
supra.

¹ *Sievwright v. Scott*, 1796, Hume 790.

² *D. of Gordon and Cuming-Gordon v. Carmichael*, 1800, Hume 805.

³ *Kennedy v. Carlyle*, 22 Nov. 1836, 15 S. 102.

⁴ *Arbuthnot v. Reid*, 1804, Hume 815.

⁵ *Barnet v. McKimming and Forbes*,

27 Nov. 1835, F.C., 14 S. 74. For the details of the last five cases cited, *supra*, chap. iv. sec. 10, art. 2, p. 443, *et seq.*

⁶ *M'Arthur v. Simpson*, 1804, Mor. 15, 181.

⁷ *Clerk v. Farquharson*, 1799, Mor. 15, 225.

⁸ 1 Bell on Leases, 313-14.

undoubted, there seems to be no reason for attributing such effects to it. The stipulations were clear from the written lease, and although the signature of the lessor was wanting, the defect was supplied by the real evidence of consent (the essence of the contract) afforded by the facts of possession and amelioration by the lessee under the lessor's view, and by his receiving the increased rent stipulated. Wherever there is equally good evidence, the same rule can be with safety applied. Nor can it detract from the soundness of the principle that the facts by which it may be established may vary in different cases, because this is nothing more than what must occur in the practical application of every rule of law in which the literal observance of precise forms or specific words is not required.

There must
be a finished
agreement.

It has been said that it seems to be necessary that these informal writings should express a finished agreement, and that they should be explicit as to the subject let, the duration of the lease, and the rent to be paid.¹ The opinion is sound; for, while it accords with the principle that the statutory requisites must be complied with, the doctrine is laid down in the Books, that although "the writ requisite to constitute a tack requireth not many solemnities," and "that a written tack requires no certain form," yet the thing set, the parties, the rent, and the time, must be clear and certain.² And in the cases (already noticed) in which informal leases were sustained against singular successors these matters were specified.³ But [435] although a deed should have the form and tenor of a lease, yet if such be not its proper character it will not be valid against a singular successor. Thus, a deed by a father in favour of his two sons was executed in the form of a lease; but its special provisions were of so peculiar a nature as to be quite at variance with the characteristics of that contract. A species of family settlement, and not a proper lease, was obviously contemplated. The duration was for thirty-eight years, but the right under the deed was held not to be assignable to a stranger; and it was laid down that it was not a lease under the statute which would affect singular successors.⁴

¹ 1 Bell on Leases, 315, Note d.

² 2 Stair, ix. 5, 2 Bankt. ix. 5.

³ Cases, *supra*, under this article.

⁴ *Stevenson v. Love and Stevenson*, 2 June 1842, 4 D. 1322, 14 Jur. 437.

CHAPTER VII.

SUBJECT-MATTER OF LEASES WHICH ARE OR ARE NOT PROTECTED BY THE STATUTE.

SECTION I.—SUBJECTS PROTECTED BY THE STATUTE.

The terms of the statute are limited to "lands" alone. But *Lands, &c.* under that word there are included all those subjects which are the adjuncts of land, styled *fundo annexa*, and which are held to be capable of being created into separate tenements. These are mills, minerals, fishings, and similar subjects.¹

As houses are *fundo annexa* and form separate tenements, it was *Houses.* to have been expected that when this large construction was given to the statute they would have been included originally, as they have subsequently been. But down to a very recent period they were deemed to be excluded. In Balfour and Craig there does not occur any notice of houses. The words of Stair are ambiguous; for he says that the statute operates in "favour of all tacksmen, whether they be labourers of the ground or not."² If taken literally, these words would include houses; but their intendment probably was that the tenants of mills, mines, &c., were equally favoured as the lessees of farms purely agricultural; for there is reported by Stair a decision putting the exclusive construction upon the statute. The purport and *ratio* of that decision were, that a lease in *prediis rusticis* did militate against the buyer of the lands, but not in *prediis urbanis*, because these used not to be under lease, but let only from year to year.³ After the date of this decision a difference [436] of opinion appears in the Institutional Books. Bankton holds that leases of houses for habitation are protected, but refers to the obstant decision.⁴ Erskine⁵ and Ross,⁶ upon the authority of that decision, and for the reasons assigned in it, hold the contrary. But afterwards that decision and those authorities were overruled, and it was decided that the lease of an urban tenement is as effectual

¹ Mackenzie's Obs. 37; 2 Bankt. ix. 1; 2 Ersk. vi. 27; 2 Ross' Lect. 476; 1 Bell's Com. 65.

² 2 Stair, ix. 2.

³ Rae v. Finlayson, 5 July 1680, Mor. 10,211-12 and 15,216. In 1 Bell on Leases, p. 328, and Note p, it is said that this case was not a decision, but a debate merely, and that Lord Kames must have made the entry in the Folio

Dictionary with reference to some other case. In so far as appears from Fountainhall's report (which alone Mr Bell cites), there was no decision. But from Stair's report it is evident that the point was raised and decided upon the grounds stated in the Folio Dictionary.

⁴ Bankt. *ut sup.*

⁵ Ersk. *ut sup.*

⁶ 2 Ross' Lect. 504.

against a singular successor as is a lease of lands. The grounds of that judgment, unquestionably sound, were formed by a combination of expediency and the universal understanding and consequent practice of the country.¹ In subsequent cases that decision was held to have settled the law;² and so, accordingly, the doctrine is uniformly laid down.³

Whether a house set along with customs, tolls, a right of shooting, or other subject which does not come within the Act, is under the protection of the Act, is a question which was formerly noticed while treating of the duration of a verbal lease.⁴ Neither an express *dictum* nor decision has been discovered. For, in a case in which the point incidentally arose, no judgment upon it was given, as the decision turned upon other matter.⁵ But there seems to be no reason for doubting that the house, though really an accessory only, will retain the legal characteristics of heritage, and, as being the *jus nobilius*, will be deemed a separate tenement under the operation of the statute.⁶

SECTION II.—SUBJECTS NOT PROTECTED BY THE STATUTE.

No general specific rule for ascertaining with precision what subjects are and what are not protected by the statute has been discovered either in the Institutional Books or in the Decisions. In the former, there is ordinarily inserted an enumeration of those subjects [437] to which the Act is deemed to be applicable, but it is obvious that the enumeration is not given as complete; and the latter, applicable to particular subjects only, contain no general rule.⁷ But in one case (to be immediately noticed) there are *data* which afford materials for approximating to such rule. As arising out of these *data*, the principle is that subjects not capable of being created into a separate tenement are not protected, although incident to heritable property. For example, a lease of a right of shooting is not protected, while a lease of a right of salmon-fishing is.⁸

¹ Waddell v. Brown, 1794, Mor. 10,309; and opinion of Lord Alloway in the Queensberry cases, noticed in Sandf. on Entail, 163-4, Note 11.

² Clerk v. Farquharson, and M'Arthur v. Simpson, *ut sup.* 434. Anderson v. Alexander and Millar, 10 July 1811, F.C. 327, and Note of Lord (Ordinary) Cunningham, in Lumsden v. Stuart, 4 Feb. 1843, 5 D. 501 and 504-5, 15 Jur., 258.

³ 1 Bell's Com. 65 and 755-6, Note 4; 2 Ersk. vi. 27, Notes † and (by Ivory)

104; 2 Stair ix. 43, Note a (by Brodie) art. 2; 1 Jurid. Styl. 3d. edit. 665; and Menzies' Conveyancing, 823.

⁴ Chap. iii. sec. 2 of this book, pp. 365, 366.

⁵ Greig and Scott v. Boyd and Latta, 1827; 2 D. and A. 207, 6 S. 259, 13 May 1829; 7 S. 529; noticed *ut sup.*, p. 366.

⁶ Preceding Notes.

⁷ Authorities under preceding section.

⁸ Pollock, Gilmour, & Co. v. Harvey, *ut supra*.

In so far as there is express authority, leases of the following subjects are not protected:—

1st, Leases of rents, or, in other words, of an estate already under tenantry, is not valid against singular successors.¹ A right to draw the rents of an heritable subject is obviously incapable of being feudalised or created into a separate tenement. Nor does such a right come within the intendment or the spirit of the Act, which was meant to protect those who were the actual occupiers of the soil and its adjuncts.² Although such contracts are denominated leases, and are treated of as such, they are, strictly speaking, assignments to the rents for an annual consideration, and are consequently mere personal obligations.³ And the rule is applicable to leases of feu-duties, casualties,⁴ or the emoluments of office.

2d, A lease of services prestable by tenants, although clothed with possession, was held to be ineffectual against singular successors. The case in which the question arose was of an unusual kind. A, the liferentrix of an estate, granted to B a liferent lease of the farm of C, with the services as presently annexed thereto and possessed by D, the tacksman thereof. Those services, thus described by a general reference to the possession of [a] particular tenant, consisted of the services of a certain number of men and horses for various agricultural purposes. The property having been acquired by the liferentrix, the estate was sold by her and acquired by different singular successors. They, by the dispositions granted to them, were bound to maintain the existing leases, by which the tenants of some of the purchased farms were bound to perform the services above mentioned to the farm of B, and did perform them during the leases. But when the purchasers were [438] entering into new leases, they deemed themselves not obliged by the dispositions to take their new tenants bound to perform these services, and accordingly discontinued them. The lessee B brought an action against his lessor A, and against her singular successors, concluding that they should cause their tenants to perform the services during the currency of his lease, that is during the lifetime of his lessor, or otherwise be accountable for the yearly value of the services. His claim was repelled; and the doctrine which prevailed was, that the intendment of the statute is that a purchaser cannot turn the tenants out of their farms, but must allow

¹ 2 Bankt. ix. 1; 2 Ersk. vi. 27, and 3 Ersk. v. 5; 2 Ross' Lect. 504; 1 Bell's Com. 757. 1 Bell on Leases, 33-4.

² Bankt. and Ross, *ut sup.*; 2 Ersk. vi. 27.

³ Bankt., Bell's Com., Bell on Leases, *ut sup.*, 3 Ersk. v. 5.

⁴ From Mackenzie's Obs. 37, a mistake might arise in consequence of the use of the word "casualties," as coming under the statute. But it is removed by the context, which proves that salmon-fishings, mines, &c., are meant.

them to possess conformably to their leases; but that the services at issue were not stipulations in favour of the tenants upon the farms, but heavy burdens imposed upon them in favour of a stranger, from which they would be happy to be relieved.¹ With this doctrine must be combined the principle already stated, as marking the boundary between the protected and the unprotected subjects.

Game.

3d, A lease of the right of killing game, although possession has been taken, is not effectual against a singular successor. The principle upon which this decision was founded is, that the right of killing game cannot be acquired as a separate tenement, but is merely a privilege incident to or attached to the right of landed property.²

Entailed mansion-house, &c.

And 4th, a lease of the mansion-house, offices, garden, and pleasure-grounds of entailed estates, must be deemed out of the operation of the statute. For the heir in possession cannot let them except for a year, or upon a lease to terminate with his life; and leases granted in contravention of that rule are ineffectual against the succeeding heir, and are reducible by him, as was shewn in detail when treating of the power of leasing vested in heirs of entail.³

There is another class of subjects with relation to which there is no express authority for determining whether they are or are not protected.

Ferries.

1st, Ferries are *inter regalia*, and a grant of a ferry confers a patrimonial right involving a power of making moderate profits by the imposition of moderate duties, subject to public regulation.⁴ Nor can the grant be effectual without the power of making upon

¹ Gordon v. Forbes, 1774, Mor. 15,221, 2 Ersk. vi. Note *. Op. of Lord Pres. in Pollock, Gilmour, and Co. v. Harvey, *cit.*

² Pollock, Gilmour, and Co. v. Harvey, 15 June 1823, F.C. No. 110, p. 968, 6 S. 913. Note by Lord Ordinary (Corehouse), and opinions of Lords Balgray and Gillies, and of Lord Pres. (Hope), [E. of Fife's Tra. v. Wilson, 14 Dec. 1859, 22 D. 191. Birkbeck v. Ross, 22 Dec. 1865; 4 Macph. 272. A doubt as to this doctrine has been expressed (Nicolson's Ersk. ii. 6, 27), which is hardly supported by the authorities referred to. See Campbell v. McKinnon, 20 March 1867, 5 Macph. 636 (per Lord Deas, 651); *aff.* April 4, 1870, 8 Macph. (H. L.) 40 (per L. Hatherley, C., 44). It has, however, been held that a lease of land with

the right of exclusive (?) occupation for sporting purposes of feus form a mere grant of a sporting privilege, and may be granted by an heir of entail under the powers of 11 and 12 Vict. c. 36, s. 24. Farquharson, 3 Nov. 1870, 9 Macph. 66; where opinions were expressed which would lead to the result that a lease of this description (or even according to Lord Kinloch, an ordinary lease of shootings) has been placed by the progress of society and the practice of the country in the same category as an ordinary lease. See also Crawford v. Stewart, 6 June 1861, 23 D. 966. Dawson v. Stewart, 20 Oct. 1869, 8 Macph. 10 (in the Regn. App. Court.)]

³ *Sup.* book i. chap. ii. sec. 1, art 12, p. 123.

⁴ *Sup.* book ii. chap. xv. sec. 2, p. 340.

the adjoining shores the erections requisite for conducting the operations. Although it is not a right separately feudalised, it may be justly deemed a separate tenement to all practical purposes, the lessee of which earns his livelihood by labour bestowed upon the [439] subject, as much as does the tenant of a farm or manufactory. The intendment and policy of the statute, therefore, are apparently applicable. In one case the question arose, whether a lease for nineteen years of certain subjects and "the ferry-boat" was to be sustained, where the lessor was attained before the lessee had attained possession. None of the points involved were decided, but in the argument there does not appear to be any distinction taken between the ferry-boat and the other subjects.¹

2d, Customs, harbour-dues, and other imposts, are grounded upon Acts of Parliament or grants from the Crown.² But the application of the statute to them appears to be doubtful. The spirit of the statute does not operate in favour of such lessees, who are in no sense included under the classes which it was intended to protect, and where capital and industry can in no respect be deemed vested in land or its adjuncts. A closer resemblance exists between them and the lessees of rents or feu-duties. In one case the doctrine that a lease of burgh customs for two years might, though verbal, be valid, was not questioned.³ If that doctrine be sound, it follows that the statute cannot apply, because by its writing is indispensable if the duration be for more than one year. As duties and customs are in the great majority of instances the property of burghs or other corporations, questions with singular successors will be of rare occurrence. But the question may occur with individual proprietors of such customs, or with the creditors of corporations; and if it should, the sounder opinion, in the absence of express authority, seems to be, that the lease would not be effectual against singular successors.

And 3d, With relation to tolls, it would be superfluous to enter into any discussion; for as they are the creatures of statute, and under the management of trustees for public purposes, questions with singular successors can hardly be supposable, or, if they should arise, must be determined by the terms or construction of the several statutes.

¹ *Gentle v. Harvey*, 1747, Mor. 13,804.

² *Sup. book ii. chap. xv. sec. 3, p. 342.*

³ *Graig and Scott, ut sup. p. 452.*

CHAPTER VIII.

POSSESSION.

SECTION I.—NATURE OF POSSESSION UNDER THE STATUTE.

The third statutory requisite is that possession shall have been taken by the lessee. The nature of the possession necessary, subject [440] to certain modifications relative to assignees and their sublessees to be afterwards noticed, is what is called natural, in contradistinction to civil possession. Natural possession has already been explained to consist in corporeally apprehending and operating upon the subject-matter according to its particular species; and civil possession to consist in levying its produce personally, or through the medium of others.¹ In order to bring a lease under the protection of the statute, natural possession, in its strict and proper meaning, is required. The lessee must himself, should his lease so provide, enter into actual possession by personal residence; or, if there be no such provision, by the instrumentality of his servants *bona fide* occupying for his behoof. In a question which of two parties claiming as appraisers should be held to have the natural possession, judgment was given in favour of him who did actually labour and sow the whole of the land; and a plea of constructive possession raised by his competitor was repelled.² Between a lessee and a singular successor of the lessor the same general rule would be enforced; for symbolical or constructive possession is not recognised.³

Registra-
tion.

In one of the older Books the question was mooted whether the registration of a lease in the Register of Reversions would supply the want of possession.⁴ The answer was in the negative; and the law was laid down that, there being no warrant for the registration, it would not supply the want of possession, and that it is by possession only that leases become real against a singular successor.⁵ Independently of leases not being mentioned in the Act ordaining the register, and independently of long and acknowledged practice, no doubt can exist that registration could not be equi-pollent with possession; for registration of a reversion is publication only, the right of the reversor having been made real by his sasine. But possession upon a lease is not publication merely, but,

¹ *Sup.* chap. iv. sec. 10, art. 1, of this book, and authorities there cited, p. 439.

² *Hay v. Douglas*, 1666, Mor. 10,603.

³ *Mackenzie's Oba*. 37; 2 *Ersk.* vi. 25.

⁴ *Dirlet. Doubts*, 411.

⁵ *Sten. Ans. eo. loco*.

as will immediately appear, the substitute or equivalent for sasine in feudal subjects. The Statute 20 and 21 Vict. c. 26 (The Registration of Leases (Scotland) Act, 1857), makes no alteration on the common law doctrine of possession.

SECTION II.—LEGAL NECESSITY OF POSSESSION.

The doctrine of the legal necessity of possession, in order to complete the lessee's right, is, in the Books and Decisions, laid down in strong terms, which principle and practice concur in sanctioning. The maxims that, "as a tack becometh a real right it must necessarily be clad with possession;" "possession is the life of a tack;" [441] and "possession is the sasine of the lease, and the sole indication by which purchasers or creditors may with certainty know the existence of the tenant's right;" combined with similar *dicta*, pervade the authorities.¹ Accordingly it has been held on the highest legal authority that by the law of Scotland even the most formal lease or tack does not give any possessory interest in the land which it purports to demise until the proposed lessee or taker enters into possession, actual or constructive.²

The necessity of possession, both upon legal principle and analogy, and upon reasons of utility, is obvious. *First*, The connection of a right to the use of landed property, with the rules of feudalism, had introduced (as was shewn in the Introduction) the practice of taking sasine upon leases as well as upon rights of property.³ Although this practice, really alien to the law, was discontinued after the enactment of the Statute of Leases, 1449, c. 17, the prevalence of the notions which dictated the necessity of occupancy as much as the words of the statute rendered possession requisite for completing the lessee's right. Accordingly the maxim was introduced that possession is the sasine of the lease.⁴ *Second*,

Lessee's right not real till clad with possession.

Rationale of the rule.

¹ 2 Craig, x. 7, 9, 10, 11; Dirlet. and Steu. 411-12; 2 Stair, ix. 7, and 3 Stair, ii. 6, and ii. Stair, ix. 43, art. 2, Note a (by Brodie); 2 Mackenzie's Inst. vi. 5; Mackenzie's Oba. 37; 2 Bankt. ix. 3 and 4; 2 Ersk. vi. 25, and Note (by Ivory) 102; 2 Ross' Lect. 498 and 500; 1 Bell's Com. 65-6, and 69, and 755-6; Bell's Pr. 1208-11; More's Notes, cxliv.; 1 Jurid. Styl. 3d edit. 622-3. Fraser v. L. Pitaligo, 1611, Mor. 6425, 15,227. Hamilton v. Tenants, 1632, Mor. 15,230. Johnston v. Cullen, 1676, Mor. 15,231. Wallace v. Campbell, 1760, Mor. 2805-12, but particularly rep. by Kilkerran,

Mor. 2811; *per curiam* in Inglis & Co. v. Paul, 26 Feb. 1829, F.C. 609.

² *Per* Lord Truro, Lord St Leonards, (C.) and Lord Brougham in Hutchinson v. Ferrier, 29 March 1852, 1 Macq. 196.

³ Introduction, chap. vii. p. 61.

⁴ Authorities *supra*, especially Mackenzie's Oba., Bankt., Ersk., and Bell's Com. But it has been justly observed (1 Bell's Com. 66, Note 4) that while the analogy generally referred to in illustration of the effect of possession in completing the tenant's right in sasine, there is this difference, that sasine once taken continues to operate, possession taken and lost is ineffectual.

subsequently, that if the lessor become the debtor of the lessee, and oblige himself not to remove the lessee until the debt be paid, the obligation will be valid against the lessor and his heir, but not against singular successors. Dirleton appears to hold a contrary doctrine, although the case put by him is not unqualified; for he says that a lease to endure until a definite sum of £180 be repaid, will be good, because the ish is not altogether uncertain, as the time within which the sum can be repaid may be calculated.¹ But Steuart holds that such a lease, being without an ish, would not militate against a singular successor.² While Stair admits that the point has been much controverted, he supports the doctrine of invalidity.³ And such likewise are the *dicta* of Mackenzie and Erskine.⁴

Cases.

[448] Although the decisions have fluctuated, the majority of cases supports the doctrine of invalidity. In the earlier cases, such leases were held to be invalid.⁵ The doctrine of invalidity was for some time overruled, for in cases subsequent to those already noticed the leases were sustained. Where a lessee had obtained from the lessor a bond granting that he had borrowed a sum of money from the lessee, and allowing him to retain possession until he was repaid, and also to retain the interest out of the rent, the lease was found to be a real right even against a singular successor, although it was pleaded that it had no ish. The *ratio* of the decision was, that it really had an ish, though indeterminate, viz., whenever the debt should be paid.⁶ But a contrary doctrine was soon afterwards received, and although varying in the special matters in which they originated, there is a series of cases establishing the general rule, and that such leases, though valid against the lessor and his representatives, are not good against singular successors.⁷

Leases for definite period, and to continue beyond that till a loan is repaid.

From the judgments given in another class of cases the same result will be derived. Where there was a specified duration named, together with a small surplus rent, and the lessee was allowed to retain the rent in lieu of the interest of the loan made by him to the lessor, the lease was sustained against singular successors for the period specified, but held bad beyond that period. A

¹ Dirlet. and Steu. 411; 2 Ersk. vi. 24, Note.

² Dirlet. and Steu. *ut sup.*

³ 2 Stair, ix. 28.

⁴ Mackenzie's Obs. 38; 2 Ersk. vi. 24.

⁵ Rollock v. —, 1614, Mor. 15,235.

Muckal v. Tenants, 1621, Mor. *ut sup.*

Partoun v. Tenants, 1621, Mor. *ut sup.*

⁶ Ronald v. Strang, 1625, Mor. 15,236.

⁷ Hardies v. —, 1627, Mor. 15,190. Bennet v. Turnbull, 1628, Mor. 15,237, 2181. Gachen v. Walkinshaw, 1629, Mor. *ut sup.* Ley v. Kirkwood, Mor. 7195. L. Clackmannan v. Tenants of Balnamoon, 1631, Mor. 15,239. Stevenson v. Dobie, 1665, Mor. 15,240, 12,834. Seton v. White, 1673, Mor. 15,137.

lease of which the express duration was seven years was sustained for that period; for it was held that as there remained a rent over and above the sum annually retained for interest, and that as the lease had a particular ish of seven years, it was valid for seven years, but could not be longer available.¹ This decision was adhered to in a subsequent case, where the duration and other circumstances were the same.² The doctrine of these cases was afterwards confirmed and a general rule established. A lease for twenty-one years, at a rent equal to the interest of the money borrowed, comprehending a clause by which the lease was prorogated from year to year after the elapse of the stipulated term, until the principal sum should be repaid, was held to be invalid.³ A lease had been granted for five [449] years, with a power to the lessee to retain yearly the interest of the sum lent, a discharge of which was to be received as payment *pro tanto* of the rent, combined with a declaration that the lease, although but for five years, was to continue until the principal sum should be repaid. After the expiration of the five years a competition arose, in which the Court held that the declaration was personal only, and therefore not effectual against a singular successor, and that although in many cases such a clause had been found effectual, where the lease was granted to the creditor until he should be repaid, and where there was a surplus rent beyond the interest, yet it was deemed that the judgment now given was thenceforward to be followed as a precedent.⁴ In this view, accordingly, there had been granted a lease for three years, with power to the lessee to obtain out of the rent the interest of a debt due to him by the lessor, and the lease to continue—at least the lessee not to be removed—until the principal sum was repaid; the lease was found not to be good against a singular successor, to defend the lessee from being removed after the elapse of the three years.⁵ The rule has, accordingly, been considered as fixed by those decisions.⁶

In one intermediate case, a lease with an ish really indefinite, but the duration of which was deemed to admit of calculation, was sustained. The lease had no other termination than the payment of the money lent. It was held that the payment of the sum was an indefinite ish if the rent did no more than pay the interest, and that in such a case the lease would not be valid; but that if

¹ Thomson v. Reid, 1664, Mor. 15,239.

² Peacock v. Lauder, 1674, Mor. 15,244.

³ Cra. of Douglas v. Carlyles, 1757, Mor. 15,219.

⁴ Mactavish (Auchinbreck's Factor), v. MacLaughlan, 1748, Mor. 15,248.

⁵ Robertson v. Spalding, 1754, Elch. (Tack) No. 20.

⁶ 1 Bell's Com. 71-2; Bell's Pr. 1194, 1199, 1201, 1212; More's Notes, ccxvi.; 2 Ersk. vi. 24, Notes.

there was a surplus, so that by intromission within a given number of years the whole debt could be paid, then the lease was good. On this decision the reporter remarks, that if such leases were too far extended, heritable securities would be disused, and the reliance upon the records impaired.¹ This decision was wrong upon principle. No positive calculation can be made of the precise period when the surplus rents will repay the loan, because sterility, or the fluctuations of the rate of interest, might necessarily affect the duration. The decision must be considered as having been overruled by the subsequent cases. A short time previously there had been decided a case which has been regarded, but erroneously, as involving the same doctrine as that now noticed. A lease was granted during a definite number of years (nineteen) for a money-rent, two dozen of kain fowls and relief from teind and public burdens. In [450] it there was a clause of retention of the whole of the money rent in payment of the interest of a loan. The lease was held to be good against a singular successor, there being a definite ish and certain tack-duty, viz., the two dozen of fowls and the relief from teind and public burdens.² While this decision has been justly considered bad upon other grounds, it cannot be so by reason of the absence of a definite ish, for the ish was specific.

SECTION V.—A LEASE OF WHATEVER FIXED DURATION IS VALID
WHERE THE LESSOR'S POWERS ARE UNLIMITED.

In the time of Balfour and of Craig,³ a lease for even nineteen years was held to be an alienation. Stair, Mackenzie, and Erskine express no opinion;⁴ but as they lay down the general doctrine that a lease is valid if it have a definite ish, they must, in the absence of a contrary opinion, be held to deem a lease good, of whatever extent the duration be, provided it be definite. Bankton holds decidedly that a lease of exorbitant duration, "as of some thousands of years," is void against a singular successor, because it is really a right of property. In the more modern Books (with one exception) the doctrine of its validity is adopted.⁵ For it is

Leases of
extraordi-
nary dura-
tion.

¹ Cockburn v. Sampson, 1698, Mor. 15,247.

² Oliphant v. Currie, 1877, Mor. 15,245.

³ Balfour 203; 2 Craig, x. 5.

⁴ 2 Stair, ix.; 2 Mackenzie, vi.; and 2 Ersk. vi.

⁵ 2 Ross' Lect. 439-93; 2 Ersk. vi. 24,

Note; 1 Bell's Com. 68-9; More's Notes, ccxlvii.; 2 Stair, ix. 43, Note a (by Brodie). The exception is 1 Bell on Leases, 38-52. Bell's opinion appears to be that very long leases are not valid against singular successors. This opinion is founded on an examination of the more recent cases; but it is erroneous,

expressly said that it does not appear on what ground of law a stranger, purchaser, or creditor can object to the efficacy of a lease, provided the ish be certain; and that while it has been questioned whether an unlimited proprietor can by leases affect the future and contingent right of subsequent purchasers or creditors; and while doubts have occasionally been thrown out, and, in one instance, an unfavourable opinion given, there is no case denying efficacy to a long lease, which is a land-right of a legitimate kind, of which third parties, by the existence of writing and possession, may be perfectly aware.¹

No doubt has ever existed that leases of the duration of ninety-nine years are valid against singular successors.² With relation to [451] leases of extraordinary duration no decision of a very old date has been discovered. In one case, comparatively early, a lease granted for an elusory rent and for a duration of two thousand four hundred years, was found not to have the benefit of the Act of Parliament in favour of tenants, and therefore not to be good against singular successors.³ But this cannot be accounted a decision, as the pure point did not occur. For although the decision had been ordinary, the elusory rent would have invalidated the lease. In a subsequent case, a lease for four hundred years was considered not to be effectual against singular successors, and it was thought that the statute was to be understood only of leases of an ordinary duration, otherwise it would destroy the security of the records. But this opinion was *obiter*, and there was no decision conformable to it. The judgment was that the lease was good against the lessee and his heir although granted under an entail, because the irritant and resolutive clauses were not inserted, but only referred to in the infestment, and the lessee had possessed above fifty years.⁴

In a case, the real nature of which has been much controverted, the Court of Session decided that a lease for one thousand one hundred and forty years, granted of lands which afterwards accrued to

H. M. Advocate v. Fraser.

as will appear when the cases relied on shall be discussed. Bell's Pr. 1195, does not speak so decidedly as in his Com. *ut sup.*, but the general purport may be deemed to be the same. It is there said there are no cases which settle on any satisfactory footing the doubts which may be raised on this subject; and all that can be safely laid down is, that a lease in which a definite term is named, but with a renewal from term to term, is not effectual against singular successors; that though a lease for two thousand years, or even for four hundred years, has been held not protected

by the statute, those were cases not turning entirely on the point of duration.

¹ 1 Bell's Com. 68-9.

² Campbell v. Siller, 1785, Mor. 15, 223. Leslie v. Orme, 1779, Mor. 15, 530, 1 Bell on Leases, 51-2. [Campbell v. McKinnon, 20 March 1867, 5 Macph. 636; aff. 4 April 1870, 8 Macph. (H. L.) 40.]

³ Alison v. Ritchie, 1730, Mor. 15, 196.

⁴ Purchasers and Cra. of Jordanhill v. E. of Crawford, 1752, Elch. (Tack) No. 18, 5 B. S. 797.

the Crown by forfeiture, was not good against the person who had forfeited, nor against the Crown as coming in his place, and subsequently there was a judgment in general terms that the lease was not good against the Crown.¹ An argument against the validity of long leases in questions with singular successors was there stated. But the authorities are not agreed upon the fact that the Court proceeded upon that principle. One opinion has been given that the lease was deemed to be bad because it was a perpetual right,² while it also has been said that the case was not one in which long leases were ruled to be bad, or that if the Court of Session proceeded upon such a ground it was not so held in the House of Lords.³ The more probable opinion is that such was the ground of the judgment of the Court of Session, for after the interlocutor finding invalidity in general terms, pleadings were ordered upon the questions whether the lease could be restricted to a shorter time, and to what time it might be restricted.⁴ But the discussion of those questions was superseded by a consent by the Crown to restrict to nineteen years. The tenor of the interlocutors, combined with the emergence of the questions of restricted duration, go [452] far to prove that the extraordinary duration formed the *ratio* of the judgment. The non-representation of the person forfeiting is not assigned as the *ratio*.

14. If such be the correct view, the judgment of the House of Lords reversing is a positive authority in favour of the validity of leases of extraordinary duration. But it has been maintained that the *ratio* upon which the House of Lords proceeded was that the forfeiting person represented the grantor, and therefore that the Crown as coming in his place was bound by the lease.⁵ No *dictum* of the Court of Appeal has been cited as supporting that opinion, which is rested wholly upon inferential reasoning. It has been said—1st That the state of the title shews that the forfeiting person did not represent the grantor; 2d, That such is proved by an opinion of counsel to have been the ground of reversal; and 3d, That when subsequently a similar case occurred, the judgment of the House of Lords was not relied upon.

14. But *first*, In the absence of evidence of a special ground, it must be held that the Court of Appeal reversed by reason of dissent from the *ratio* of the Court of Session. *Second*, The opinion of counsel referred to⁶ does not contain any evidence of

¹ His Majesty's Advocate v. Fraser, 1758, Mor. 15,197; [1 Hailes 406, 2 Pat. App. 66;] Swinton's Registration Court Appeals, No. 319, p. 82.

² Ross Lect. 493.

³ 1 Bell's Com. 69, Note 1.

⁴ Mor. 15,199.

⁵ 1 Bell on Leases, 42-7, and Notes A and C.

⁶ The opinion was that of Mr Ferguson of Pitfour.

the grounds upon which the judgment of the House of Lords proceeded. The opinion was obviously given before the argument on the appeal, and merely contains grounds upon which the counsel apprehended that a reversal should be obtained, although the extraordinary duration should be deemed a sound objection. But there is no reason for holding that the reversal proceeded upon the grounds there suggested. *Third*, The absence of reference in the subsequent case (to be immediately noticed¹) proves nothing, for even supposing that the judgment of the House of Lords was pronounced when the pleadings from which the report is framed were prepared, and holding that there was not (as there really was) a material legal difference between the cases, there was special matter independently of the general doctrine upon which the argument was mainly rested, and upon which exclusively the judgment was founded. And *Fourth*, From the observations of the Court in a case which occurred some years afterwards,² it is clear that the reversal was deemed to have proceeded on the general principle, for it was held that the older doctrine had been overruled, and that as an ish had there been postponed to upwards of one thousand one hundred years, a lease might on the same principle be extended to as many thousands.

While in one subsequent case there was no judgment or opinion adverse to the doctrine of validity,³ in another⁴ the rule that [453] leases of whatever duration were valid against heirs was held to be clear. And a similar doctrine was laid down *obiter* as applicable to singular successors. No case has since occurred in which the question was presented pure, so that the law could be settled. But the validity of leases of extraordinary duration appear to have been held to be law by the strongest inferential reasoning. A question emerged under an entail, whether a lease for nine hundred and ninety-nine years fell under the prohibitions. It having been decided that it did not, there being a permissive clause to let on certain terms without limitation in point of duration, and the lease having been so granted, it was sustained.⁵ On this judgment it has been well observed, that as an heir of entail is so far regarded in the light of a singular successor, he is not bound to fulfil a lease not clothed with possession or the like, though valid against the lessor and his representatives in unentailed property; so if the lease at issue had not been valid against a singular successor, it

Wight v.
Earl of
Hopetoun,
and Scott v.
Straiton.

Earl of Elgin
v. Well-
wood.

¹ Wight v. Earl of Hopetoun, 1763, *ut sup.* p. 463.

² Wight v. E. of Hopetoun, *ut sup.*

⁴ Scott v. Straiton, *ut sup.*

³ Scott v. Straiton, 1771, *ut sup.* p. 463.

⁵ Earl of Elgin v. Wellwood, 1831, 1 S. 44.

would not have been so against the heir of entail.¹ Without presuming to say that the law is fixed, the opinion more consonant with principle and authority is that a lease of any definite duration may be granted by an unlimited proprietor.²

But the singular successor must be dealt with *bona fide*; and therefore fraud, practised in filling up the duration of a lease which had been blank, was found not to affect a singular successor ignorant of the fraud.³

SECTION VI.—DURATION WHERE THE POWERS OF THE LESSOR ARE LIMITED.

Where the powers of the lessor are limited, as by an entail, corporation privileges, or tutory, or where generally the lessor is bound to act according to the rules of good administration, leases granted by him can be only of that duration which those rules sanction. But these and similar cases having been already fully discussed when examining the powers of lessors, recapitulation is unnecessary, and reference is made to that part of the treatise.⁴

SECTION VII.—LEASE FOR SUCCESSIVE LIVES AND SEPARATE PERIODS AFTERWARDS—DURING PLEASURE—WITH ALTERNATIVE DURATION—BEARING REFERENCE TO PREVIOUS LEASE—AND WITHOUT AN ISH.

Leases are occasionally granted with modes of duration which it is difficult to reduce under any precise department of that statutory [454] requisite. Examples of these are leases for successive lives and separate periods afterwards—during pleasure—with alternate duration—and without an ish.

Art. 1.—
Lease for
successive
lives and
separate
periods
afterwards.

1st, A lease being for three lifetimes and several periods of nineteen years thereafter, and being assigned, if the lessee have no heirs, either in *esse* or *posse*, the nineteen years, in the absence of any modifying clause, begins to run at the lessee's death.⁵

2d, A lease was granted to A for his lifetime and the lifetime of his heir-male, and after the decease of the heir-male for the lifetime

¹ 2 Stair, ix. 43, art. 2, Note a (by Brodie).

² [See Campbell v. M'Kinnon, *supra*.]

³ Crighton v. Carruthers, 1671, Mor. 4898, 2 Br. Sup. 594.

⁴ *Supra*, book i., chaps. i. and ii., pp. 81-132.

⁵ Dirl. and Steu. 415.

of his heir-male and two nineteen years thereafter. B acquired right to the lease, and an action of spuilzie against third parties having been raised by him under the lease, it was pleaded that the lease had expired, and that if B would prove that A had an heir-male surviving, the defenders would prove that two periods of nineteen years had elapsed since the death of the last heir-male. It was found that the pursuer B should condescend upon an heir-male, and prove that he survived A; and that if he should so condescend and prove, then that the defenders ought to prove that the lease was expired.¹

3d, A lease was granted to A during his life, and after his decease, during the life of B, his eldest son, and for the space of two nineteen years after B's decease. A and B having both died, and two nineteen years having run since the death of B, who died first, the lessor contended that the lease had expired. In defence it was pleaded that the lease having been granted for two liferents, the naming of the son was not to be understood personally, but *designative*, for that otherwise the lease would be but for a life. The judgment was that the nineteen years commenced from the death of the father A, who survived his son B; "but the interlocutor was stopped before pronouncing till the tack was reconsidered."²

4th, A lease having been granted to A and his wife for their lives, and to their son for three nineteen years, the entry of the son as well as of the father and mother being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foressaid space "next and after baith their deceases," it was held that the lease to the son commenced at the same date with the liferent lease, and not at the expiration of it.³

[455] 5th, Where a lease has been granted for a definite period, and for the lifetime of the tenant in possession at the expiration of that period, the duration is regulated, not by the life of a sublessee, but by the life of the principal lessee then in right of possession.⁴

And 6th, A lease had been granted to A "and B, his eldest son, and the longest liver of them two, during all the days of their lifetimes, and of the heirs to be procreated of the said B's body, male or female, during all the days of their lifetime, and the assignees of one or other of them and their heirs during their lifetime, and for three nineteen years after the termination of the last heirs above related their entry to the said lands." The point which occurred

¹ E. Dundonald v. Glenagies and E. Mar. 1675, Mor. 15,193.

² Bishop of Galloway v. Innes, 1684, Mor. 15,194.

³ Burnett v. Aberdeen, 1741, 1 Cr. and St. App. 305.

⁴ Ronaldson, 18 Dec. 1812, F.C. 49, More's Notes, ccli.

for decision was, when did the three nineteen years (at the expiration of which the lease was to terminate) begin? A and B had possessed during their respective lives, B had died without assigning the lease, but his eldest son C assigned it to D and his heirs. After the death of D, his heir E entered into possession, and possessed by virtue of the lease as heir of the assignee. It was decided that "the *terminus a quo* the three nineteen years commence to run must be after the death of the heir of the assignee," holding that the destination to the "heirs" of the assignee must be limited to the first heir.¹ These and similar modes of duration are protected by the statute; and in the cases cited the construction put upon the terms of the clauses appears to have been sound.

Art. 2.—
Lease during pleasure terminates with the life of the lessor or lessee.

Where a lease was granted during the will and pleasure of the lessor, it was held that upon his death the lease terminated, *quia voluntas morte extinguitur*; and therefore that it was not valid against an action of removing at the instance of an heir to a donatary of ward.² And in an action of removing, the lessee having pleaded that his lease bore a provision that he should not be removed if he found a certain person (named) as cautioner for his rent, and nullity by reason of want of an ish having been pleaded, the Court sustained the lease as being during the lessee's pleasure, which terminated with his life.³

Art. 3.—
Lease with alternative duration.

[456] A lease having been granted to endure for nineteen years or two lives, in the option of the lessee, and he having made no election at the end of fourteen years, it was decided that he was still entitled so to make his election as to have the lease granted for the two lives, because no time had been fixed for making the election, and it was incumbent upon the proprietor to insist to have the option declared.⁴ This decision appears to have proceeded on the principle that the lessee was entitled to have a lease of nineteen years certain, or of two lives, he taking his chance of those lives expiring sooner, and therefore at any time in the course of the nineteen years he had a right to resort to the alternative by taking the chance of the lives.

A new missive of tack had been given by one who held the same

¹ *Grime v. Whytock*, 1819, n.r., noted by More, *Notes*, cxxlvi.-vii. [See *Carnegy v. Scott*, March 1832, 1 S. App. 114. See 4 W. and S. 431.]

² *Heiress and Repres. of E. of Moray*

v. Tutors of Sanquhar, 1583, Mor. 2266, 1 B. S. 120.

³ — *v. Ferme*, 1680, Mor. 15,193.

⁴ *Gray v. E. Sutherland*, 1765, Mor. 460.

lands under a former tack. The missive did not specify the term of endurance of the new sett, but bore generally to be given "in the same conditions with the former lease." In a question about the duration of this tack, the landlord maintained that these words were to be construed as relative only to the rules and conditions of management of the lands. It was found that they applied also to the term of the duration of the tack, viz., twenty-one years, the term in the former tack.¹

Art. 4.—
Lease
bearing
reference to
a previous
lease.

A lease in which the term of duration or ish is not expressed is considered as granted for a year;² and if the intention of parties that it should continue for more than one year appear by any clause in the lease, it is in *arbitrio judicis* to fix the period of duration. In exercising this power the Court have leant to the principle of confining the duration within a short period, during which it shall be valid against singular successors.³ Where by a lease the lessee was obliged to manure a certain quantity of ground yearly, and to bring home to the lessor every year twenty loads of coals, and to perform similar prestations, it was pleaded that, as the lease was not to be perpetual, the Court must fix the duration; and [457] accordingly the lease was sustained for two years.⁴ For the details of *rei interventus* upon duration, reference is made to the discussion of its effect upon the informal written lease.⁵ Here it is enough to mention that where no sufficient *rei interventus* had taken place, a missive, silent as to the term of duration, was, like an ordinary verbal lease, found to be good for one year only.⁶

Art. —
Lease with-
out an ish.

CHAPTER X.

RENT.

The existence and expression of a specified rent are necessary to secure a lessee against singular successors. In this chapter the subject of rent shall be considered no further than as it relates to

¹ Hay v. McCracken, 1807, Hume 832. The learned reporter states that he had only a short note of this case, and that the papers had not been preserved.

² 2 Craig, x. 7; 2 Stair, ix. 16; 2 Mackenzie's Inst. vi. 9, Note (1) by Bayne.

³ 2 Ersk. vi. 24, and Note (by Ivory) 99; 1 Bell on Leases, 315, Note d.

⁴ Redpath v. White, 1737, Mor. 15, 196.

⁵ *Supra*, chap. iv. sec. 10 of this book, pp. 440-442.

⁶ Clark v. Lamont, 27 Jan. 1816, F.C. 72.

Fluctuations.

As where retention was combined with indefinite duration the rule of law fluctuated, so there have been similar fluctuations with relation to the power of retention by itself. A lease where the rent was discharged was held to be bad.¹ But for a considerable time the Court inclined to support leases which were securities for debt. They distinguished where the leases were let for a definite term, and not indefinitely until the money was repaid, and where the retention was not total, but left a surplus rent. The principle of this decision is said to have been that the proprietor might have let for that surplus.² Where a lease had been granted for a definite period for money-rent and certain kain fowls and payment of certain public burdens, but with a clause of retention of the whole money-rent for payment of the interest of a loan, it was sustained by reason of a small surplus rent.³ The general rule was afterwards laid down, that where a lease contains a definite ish it is good against singular successors, although the lease be wholly allocated for payment of the annual rent of a sum owing by the lessor to the lessee.⁴

Clause of retention held personal.

But this doctrine was subsequently overruled by cases which, although involving other matter, have been held to form precedents upon this point.⁵ In one, although there was also a definite duration, the doctrine has been deemed to have been laid down that a clause of retention was personal merely, and not valid against singular successors.⁶ In another, the question having arisen whether a power given by a separate deed to retain rents for relief of obligations undertaken by the landlord was effectual against creditors, the power to retain was held not effectual after sequestration.⁷

Present rule.

The rule now is that a tenant cannot acquire, either by [464] separate bond or contract, or even by a stipulation in the lease itself, a right to retain the rents against singular successors in extinction of debt or in payment of interest,⁸ and it applies where the obligation is in favour of the creditors of the landlord.⁹ But the doctrine is subject to certain modifications.

1st, A right of retention is valid against singular successors if

¹ *Ross v. Blair*, 1627, *ut sup.* p. 475.

² 2 *Ross' Lect.* 503.

³ *Oliphant v. Currie*, 1677, *Mor.* 15,245, 3 B. S. 320.

⁴ *Seton v. White*, 1679, *Mor.* 15,173, 15,245.

⁵ *Auchinbreck's Factor v. Maclauchlan*, 1748, *Mor.* 1736, 15,248. *Cra. of Lord Cranstoun v. Scott*, 1757, *Mor.* 15,218, 5 B. S. 830; 2 *Ersk. vi.* 29, and

Note f; 2 *Ersk. vi.* 24; 2 *Ross' Lect.* 502; 1 *Bell's Com.* 72, and *Note 4*.

⁶ 2 *Ersk. vi.* 29. *Mactaviah v. Maclauchlan*, *ut sup.*

⁷ *Lord Cranstoun's Cra. v. Scott*, *ut sup.*

⁸ 1 *Bell's Com.* 72; *Bell's Pr.* 1903; *More's Notes to Stair (Tacks)*, cxxlvi.

⁹ *Ersk.*, *Mactaviah*, and *L. Cranstoun's Cra.*, *ut sup.*

the clause be connected with the lease itself, and intended as in security of counter obligations come under by the landlord; and even although there be no such clause, where the right is authorised by local custom.¹ Originally such a clause was deemed to be personal only, and therefore valid only against the lessor himself, but not against his singular successors.² But afterwarde it was decided—*first*, That a clause in a lease bearing that the lessee upon his removal should be paid the expense of inclosing, was effectual against a singular successor.³ *Second*, In a mineral lease the lessee obliged himself to furnish a certain portion of the mineral annually at a fixed rate, and the lessor obliged himself to make payments at certain periods for the quantities thus delivered. An adjudger having insisted upon delivery of the quantity stipulated, a right of retention by the lessee until payment of arrears was sustained. The *ratio* was, that as the lessor could not have demanded the stipulated quantity without satisfying the lessee for what he had already received, the adjudger must be in the same situation.⁴ *Third*, An outgoing tenant claimed from a singular successor of his landlord the value of certain houses built by him on the farm at his own expense. No such obligation was contained in the missives of lease, but the lessee relied on a custom in the district of country where the lands were situated. The claim was sustained, although there was nothing but this local practice to point out its existence to the purchaser of the lands.⁵

Right of retention valid against singular successors when inherent in the subject-matter of the lease.

But there is a case involving an opposite doctrine—A tenant became bound to erect a building, for the expense [465] of which it was stipulated in the lease that he was to be allowed to retain part of the rents. The proprietor sold the lands before the building was erected; but the tenant having afterwards erected the building, claimed retention of the stipulated amount out of the last term's rent [payable to the seller.] The defence was that the building having been erected posterior to the sale, could only benefit the purchaser, and therefore that the counter-obligation must fall upon

¹ Ersk. and Bell's Com., *ut sup.*; Bell's Pr. and More, *ut sup.*; and Bell v. Lamont, *ut infra*.

² Rae v. Finlayson, 1680, Mor. 10211-12. Macdona v. Macdona, 1780, noted in Arbuthnot and Morrison, *ut infra*.

³ Arbuthnot v. Colquhoun, 1772, Mor. 10,424. [Stewart v. M'Ra, 12 Nov. 1834, 13 S. 1. See below, vol. ii. p. 225 of 3d ed.]

⁴ Walpole and Alison v. Montgomery Beaumont, 1780, Mor. 15,249.

⁵ J. and A. Bell v. Lamont, 14 June 1814, F.C. 646. In the fourth edition of his Commentaries Bell seems to deem

this case to have been well decided, but in the fifth edition (vol. i. p. 74) he states the import of the case merely, without any approbatory remark. If his opinion of the soundness of the decision was shaken, it had probably been in consequence of serious doubts which in other cases had been raised relative to the extent of the conditions sanctioned by local usage, which shall be examined hereafter. As to the point now under consideration, the case must be held to have fixed the law, and so Bell appears to deal with it in his Principles, 1902.

him, and not upon the former proprietor. The purchaser was called as a defender, and the plea of retention was repelled.¹ This case was ill decided, because it is contrary to the principle that a singular successor must be bound by the stipulations *ex facie* of the lease connected with the subject-matter, and intended as a security of counter-obligations. No equitable or reasonable deduction can be founded upon the fact that the houses were not built till after the sale; for the power to build and the right to retain, being integral parts of the contract, might be exercised *quandocunque*. If they had been built, the purchaser would probably have paid as much more for the lands as the houses cost. It is also adverse to precedents; and the action having been brought by the lessor himself against the lessee, for payment of rent, and retention pleaded, the right was good as against him, leaving him to obtain relief against the purchaser if he could shew cause.

Not so when
truly of a
personal
nature.

2d, But where the stipulation, although engrossed in the lease, is truly of a personal nature, and not referable to the relation of landlord and tenant, and to the *essentialia* of the contract of lease, it is not obligatory on a singular successor.² The proprietor of an estate let certain lands to a tenant for a term of years at a yearly rent of £12, out of which the tenant was to be allowed £5 a year for acting as ground-officer. The estate was afterwards acquired by a singular successor, who removed the tenant from being ground-officer. It was doubted whether the stipulation, although embodied in the lease, would have been binding on the original proprietor. It was held that it was not binding upon the singular successor, and that the tenant was bound to pay the rent without deduction.³

3d, Erskine (on the authority of a case already cited) holds that a clause of retention for payment of debt or interest will defend the lessee against singular successors if he should be sued for payment of rent due before he was legally interpellated.⁴

[466] 4th, It has been laid down that a lease may be indirectly so arranged as to afford good security for the interest of a loan, or even for the principal sum; for as the rent may be fixed arbitrarily, the parties may, on calculation, settle a rent and fix a period which will afford to the lender security for his interest, and insure a gradual extinction of the principal.⁵

¹ Morrison v. Patullo and Laird, 1787, Mor. 10,425. The case is also reported in the Fol. Dic. 78, where the decision is stated as having been directly the reverse. According to the report in the F.C., the Lord Ordinary sustained the plea of retention, but the Court altered the interlocutor and repelled the plea.

² Lord Jeffrey's opinion in Montgo-

merie v. Carrick and Napier, 23 June 1848, 10 D. 1396, 20 Jur. 584.

³ Ross v. Duchess-Countess of Sutherland, 21 June 1838, F.C. 794, 16 S. 1179.

⁴ 2 Ersk. vi. 29; M'Tavish v. M'Lauchlan, *ut sup.*

⁵ 2 Ross' Lect. 502; 1 Bell's Com. 72. [See Macvane v. Maclean, 26 June 1873, 11 Macph. 765.]

SECTION V.—RESTRICTIONS ON POWER OF LESSOR TO FIX RENT OR
TAKE GRASSUM.

As with reference to duration, so, with relation to fixing rent or taking grassum, the lessor, where his powers are limited by an entail, corporation privileges, or other restrictions, must act according to the rules of good administration, conformably to which alone he can lease. The rules applicable to such cases having been stated when examining the powers of lessors, reference is made to that part of the treatise.¹

CHAPTER XI

RENTAL RIGHTS WITH RELATION TO SINGULAR
SUCCESSORS.

Rental rights, like ordinary leases, are real rights, and effectual against singular successors, when the statutory requisites as applicable to them are observed. In so far as relates to subject-matter, and to those who are or are not to be accounted singular successors, rentals agree entirely with ordinary leases. On the latter point, it was decided that a tack set to a kindly tenant after rebellion, and before the gift of liferent escheat and declarator, was valid.² In the requisites of writing, possession, and rent, those rights are very similar to leases; but with relation to duration there is a material difference. Their requisites shall be discussed as follows:—1st, Writing; 2d, Possession; 3d, Duration; 4th, Rent.

SECTION I.—WRITING.

Writing is essential to the constitution of a rental; for rentallors ^{Writing essential.} possessing without any written title are removable at the pleasure [467] of a singular successor.³ But to be valid against singular successors a rental must be described as such in a writing signed and delivered to the rentaller.⁴ In a process of removing (of an

¹ Sup. book i, chape. ii. iii. iv.

² Parton v. Drumrah, 20 Nov. 1621, Mor. 15, 183.

³ M'Kenzie v. Gullen, 1781, Mor. 10, 310, 15, 188.

⁴ 2 Stair. ix. 18; 2 Mackenzie's Inst. vi. 9; 2 Bankt. ix. 41-4; 2 Bank. vi. 37; 1 Jurid. Styl. 2d edit. 688.

old date) at the instance of a singular successor, the tenant pleaded that he was rentalled for life in the proprietor's holograph rental-book; and offered to prove that by the custom of the barony this was understood to be equivalent to a formal rental. But it was at that period held, that although this might bind the landlord, it formed no obligation upon the tenant to possess for life, and so not being a real right could not be good against singular successors.¹

SECTION II.—POSSESSION.

As rentallers were, or were deemed to be, the descendants of the ancient possessors of the lands, it will ordinarily occur that the right is granted to a person actually in possession. But on this point rentals do not differ from ordinary leases, and there must be possession to give them validity against a singular successor. This accordingly is assumed in the Books, where the necessity of actual entry is laid down.²

SECTION III.—DURATION.

Art. 1.—
Duration
where no
ish is ex-
pressed, nor
heirs are
mentioned.

The insertion of a definite ish or duration is not necessary to render a rental valid against a singular successor. There has been much fluctuation of opinion concerning the period for which the right was to subsist when no duration was expressed; but the right is now held to be one of liferent.

At an early period rentals had nearly attained to the rank of heritable rights. Balfour lays down the doctrine that where a man is rentalled in the King's rental, his children ought to be rentalled, and his wife to have a liferent.³ M'Kenzie (referring to a statute to be immediately noticed) says that the law had thought that it needed an Act of Parliament to resolve the Crown rentals into bare liferents; and therefore that in other cases where there is no statute it would seem that rights granted to a man should regularly extend to his heirs.⁴

Crown
rentals.

[468] In so far as related to the Crown rentals all difficulty was removed by a special statute, 1587, c. 68, by which it was enacted that all rentals granted by the Crown (except feu-rentals let to the

¹ L. Aytoun v. his Tenants, 1635, ix., compare sections 41 and 44; 2 Ross' Mor. 7191, 15, 187, 16, 476.

² 2 Stair, ix. 19; 2 Mackenzie's Inst. vi., compare sections 9 and 8; 2 Bankt.

ix., compare sections 41 and 44; 2 Ross' Lect. 479; 1 Jurid. Styl. 2d edit. 687-8.

³ Bal. 201, c. xxviii.

⁴ Mackenzie's Obs. 247.

grantees and their heirs) should resolve into liferent rights, and that upon the decease of the rentaller the possession might be disposed of by the King.¹ But concerning rentals by subjects which were left to be regulated by the common law, there existed much difference of opinion. Craig lays it down that anciently a rental, if of church lands, was presumed to have been given during life; and if of other lands, the duration was interpreted to be for one year only. This he modifies by stating that whereas it seemed that a rental had in it something more than a tack, the Court made this mitigation, that a rental indefinite as to time should be esteemed as if given for five years; but some lawyers judged that a rental of lands lying within a barony lasted no longer than one year, while others extended the duration to the lifetime of the rentaller.² Ultimately the rule, (confirmed by the cases of the Crown and Church rentals) was held to be, that as rentals were granted from a special regard to the rentaller, they subsisted during his life, and were effectual against singular successors, although they had no ish expressed in them.³ Mackenzie appears to give contradictory opinions. In his Institute he says that rentals last no longer than for a year if there be no time expressed.⁴ But in his Observations upon the Statute 1587, c. 68, he says that although the Act mentions only rentals set by the King, yet that rentals set by subjects are not extended to heirs, except heirs be mentioned; from which the inference is that he contemplated a liferent right.⁵ Bankton lays it down that the custom of the barony will frequently be observed as the rule.⁶ But, as will immediately appear from the decisions, the custom of the barony was often deemed immaterial.

The decisions, like the *dicta*, have fluctuated. In an early case it was decided that rentals, by their own nature, are not transmissible, but terminate by the decease of the giver, and also of the receiver, being *stricti juris* unless the contrary be expressed.⁷ The right, consequently, was of a mixed nature, being valid against singular successors as long as the granter lived, but terminating upon his death. In a case immediately subsequent, a new doctrine was adopted; for an indefinite rental, containing no term of duration, "was refused to be sustained for life" (of the rentaller),

Rentals by subjects.

Conflicting decisions.

¹ Glendock, 280; Mackenzie's Obs. *ut sup.*; 2 Ross' Lect. 481.

² Craig, ix. 24; 2 Mackenzie's Inst. vi. 9, Note *f* (by Bayne); 2 Ersk. vi. 37.

³ 2 Stair, ix. 19 and 20; Mackenzie's Inst., *ut sup.*, (Bayne's Note); 2 Bankt. ix. 41 and 44; Ersk., *ut sup.*; 2 Ross' Lect. 480-1; 1 Jurid. Styl. 3d edit. 746.

A lifetime is the period set down in the Style, from which it would appear to have been deemed the ordinary duration.

⁴ 2 Mackenzie's Inst. vi. 9.

⁵ Mackenzie's Obs. *ut sup.*

⁶ 2 Bankt. ix. 41.

⁷ A v. B, July 1612, Mor. 10, 220.

[469] unless the custom of the barony was proved to be so.¹ But the custom of the barony was soon afterwards disregarded. An indefinite rental, mentioning no duration, and bearing only that the person in whose favour it was granted should be received as kindly tenant to the setter and his heirs, was found to endure for the joint lives of the setter and the rentaller, and that there was no need of proving that such was the custom of the barony concerning duration. The same rule was held to be applicable although the clause had been that the rentaller and his heirs were to be received as kindly tenants to the setter and his heirs.² The rule was deemed to be so fixed that where a rental was to the grantee and his heirs *ad perpetuam remanentiam*, the Court, not sustaining it as a perpetual right, and therefore being obliged arbitrarily to fix a period of duration, decided that it was to endure for the setter's and receiver's lives *conjunctim*.³ And a rental granted to a man and his wife during their lives, not bearing the longest liver nor any issue, was yet found to constitute them both rentallers during their lives, and the wife surviving to enjoy the same.⁴

In some cases, by special custom, the benefit of the rental right devolved to the widow.⁵

Art. 2.—
Rental
granted to
the rentaller
and his
heirs.

Where a rental was granted to a rentaller and his heirs, the term of duration is said to have been, by the older practice, the same as if the term "heirs had not been inserted."⁶ This view is sanctioned by an early decision;⁷ and, upon a similar principle, where in a lease to a man and his wife during their lives there was an obligation upon the granter to receive their children as kindly tenants so long as they were able to pay the tack-duty, the right was held not available to the eldest child against a singular successor, as the tack, so far as in his favour, wanted a definite duration.⁸ So, a rental bearing that the granter should receive the rentaller's children after him as kindly tenants, upon such conditions as they should agree upon, while it was found sufficient to defend the rentaller's heir against the granter, was considered to be invalid against a singular successor.⁹ But subsequently a rule more conformable to the tenor of the right having been adopted, such rentals

¹ *Crosbie v. Donaldson*, 1619, Mor. 15,187.

² *L. Aytoun v. his Tenants*, 1625, Mor. 7191-2, 15,187.

³ *E. Galloway v. Tenants*, 1627, Mor. 7193, 15,190.

⁴ *L. Ley Younger v. Kirkwood*, 6 March 1639, Mor. 7195.

⁵ 2 Ross' Lect. 481.

⁶ 2 Ersk. vi. 38.

⁷ *L. of Aytoun v. Tenants*, *ut sup.*

⁸ *Hamilton v. Tenants*, 1626, Mor. 15,188.

⁹ *L. of Cornhill v. Wilson*, 1626, Mor. 15,168.

were [470] adjudged to subsist during the lives of the rentaller and his first heir, which was the least deviation from their genuine nature. If they had been made to extend to all succeeding heirs, they would have become proper heritable rights.¹ This rule was rested upon a series of decisions. Thus, a rental given by A to B, bearing that A rentalled B and his children as kindly tenants to him in his lands of C, was found to extend only during the lives of the father and the eldest son.² A general rule was shortly afterwards adopted; for it was decided that a rental given to a man and his heirs ought to last for the life of the first heir to whom the rental was given, and no longer, without regard to the special custom, but conformably to the Roman law, l. 14, *Cap. de usufruct.*, which rule the Court declared that they would follow in all time thereafter when the question should occur.³ Notwithstanding this declaration, the Court appear to have deviated from the precedent. A tack was set containing a clause that the granter should receive the tacksman and his heirs as kindly tenants after the expiration of the tack. This clause was found to import that the tack should subsist against a singular successor during the life of the survivor, whether setter or tacksman.⁴ This was an anomalous description of right, superior to a bare liferent but inferior to a right accruing to the heir. For it gave to the heir a contingent right of liferent commensurate with the granter's life. But by a decision long subsequent, the Court returned to the precedent, and found that the first heir has the benefit of a rental granted to heirs indefinitely, but that with his life it terminates.⁵

In a comparatively modern case it has been decided that a *Art. 2.—*
perpetual rental is not good against a purchaser.⁶ *Perpetual*
rental.

SECTION IV.—RENT.

While grassums, renewable sometimes at the death either of the landlord or tenant, but more ordinarily at the death of the tenant only, were anciently deemed especially applicable to rentals,

¹ 2 Stair, ix. 19; 2 Mackenzie's Inst. vi. 9; Mackenzie's Obs. 247; 2 Bankt. ix. 41; Ersk. *ut sup.*; 2 Ross' Lect. 480-1; Bell's Pr. 1281; More's Notes to Stair (Tacks), cclxvi.

² Agnew v. E. Cassilis, 1627, Mor. 15,189.

³ Ahannay v. Aytoun, 1632, Mor. 15,191, E. Galloway v. Tenants or Bur-

goesses of Wigton, 1631, *ut sup.*, under date 26 June 1627, Mor. 7193.

⁴ Gordon v. McCulloch, 1633, Mor. 15,192.

⁵ E. Nithsdale v. Brown, 1713, Mor. 15,194.

⁶ Kerr v. Waugh, 1752; Mor. 10,308, 15,185.

the [471] existence of a yearly rent likewise is implied.¹ But as the rentallers were meant to be favoured as the descendants of the original possessors, the rent was low or favourable, being often the original rent merely.² Bankton expressly says that a rental will be null if it do not mention a precise rent; for otherwise it would not be a lease, whereof a rental is a species.³ This *dictum* is supported by the analogy of a decision, in which it was held that a bond having been granted obliging the granter to receive a rentaller's children as kindly tenants upon such conditions as they should agree upon, it was incumbent that the conditions similar to those contained in other rentals by the granter should be performed, for that otherwise the rentaller might possess the land and pay nothing; but that if no duty was paid a rental-right would be invalid.⁴ But a rent, although almost elusory, would apparently be sufficient, by reason of the favourable nature of the right. In the Style of a rental right the considerations inserted are rent and grassums, and other duties and services used and wont.⁵ The services must, however, as in an ordinary lease, be specific, conformably to the 20 Geo. II. c. 50.

CHAPTER XII.

PROROGATION AND RENEWAL OF A LEASE IN QUESTIONS WITH SINGULAR SUCCESSORS.

The only difficulties concerning prorogation and renewals of leases relatively to singular successors emerge out of the doctrine of possession, for in all the other requisites prorogations and renewals are identical with original leases. And with reference to possession, the whole doctrine resolves into the question, whether, if a prorogation or a renewal of a lease be granted, and while the original term is unexpired, the granter shall be denuded and the lessee held, with relation to the prorogated or renewed period, to have attained possession so as to render the lease valid against the singular successor.

¹ 2 Stair, ix. 19; 2 Mackenzie's Inst. vi. 9.

² 2 Ersk. vi. 37; 2 Ross' Lect. 479, 1 Jurid. Styl. 3d edit. 746.

³ 2 Bankt. ix. 44.

⁴ L. Corahill v. Wilson, 1626, Morr. 15, 188.

⁵ 1 Jurid. Styl. 2d edit. 688, 3d edit. 746.

SECTION I.—WHERE POSSESSION ON NEW LEASE IS MADE TO
COMMENCE AT ITS DATE.

Where the possession on the second or new lease is made to commence at its date, and where it differs from the former lease, as by [472] a change of the rent, it has been said that although the former lease may not have been formally renewed, there seems to be no doubt that the new lease will be effectual against a purchaser.¹ This opinion is sanctioned by a case in which it was decided that one possessing upon a lease, and getting a new lease for a smaller tack-duty presently to commence, might ascribe his possession to the new lease, so as to prefer him to a singular successor in the lands.² But in another report the *gist* of the decision is given differently, namely, as if the second lease were a proration of the first, and to commence after its expiration.³ If the latter be the true reading, the decision would now be accounted bad, the doctrine having been overruled in modern cases, as will immediately appear. Where the term of possession was prolonged by a separate and subsequent missive, the lease was held to be good against a purchaser.⁴

SECTION II.—WHERE THERE IS A PROBATION OR RENEWAL TO
COMMENCE AT A SUBSEQUENT DATE.

Where the prorogated or renewed lease (for practically it is difficult to draw a distinction) is to commence at the expiration of the current lease, and in the meanwhile the landlord is divested, the doctrine of validity and invalidity has alternately prevailed, but the latter is now the rule of law.

The doctrine of Craig is, that where the granter has been denuded previously to the term of entry, and therefore cannot give the lessee entry, the lease is null.⁵ No direct opinion is given by Stair, but by an analogical case which he puts he may be deemed to have favoured the doctrine of validity; for he says that where the tenant was in possession, not by virtue of the lease, but by virtue of a wadset, and the lease was renewed at the time of the

¹ 1 Bell on Leases, 54-5; Bell's Pr. 1210.

² Neilson v. Menzies, 1671, Mor. 15,231.

³ Mor. 7770.

⁴ Thomson v. Terney, 1791, Hume 780. Hume approves of the doctrine of this decision, but Bell (Pr. *et sup.*) says that it may be doubted.

⁵ 2 Craig, x. 7 and 11.

been said that even a verbal promise upon a communing with the assignee is sufficient.¹ But this doctrine has been questioned, and the decision upon which it has been rested shewn not to be in point.² Parole evidence of intimation has been said to be inadmissible.³ A reference to oath as between assignee and debtor has been said to be competent;⁴ but this doctrine has been doubted, and it has been said that the practice does not go that length.⁵

Private knowledge of an assignation has, on the principle of *mala fides*, been held to operate the exclusion of a competing right. A removing having been pursued by an assignee against a sublessee in possession, the plea that the sublessee was *in mala fide* to take the sublease, having been in the actual knowledge of the prior assignation, was admitted, and on proof was sustained.⁶

SECTION IV.—TRANSLATION AND RETROCESSION.

Where the assignee again assigns a lease, it becomes a translation; and where the assignee re-conveys to the cedent it is termed a retrocession. In the former case the same procedure and result occur as in the case of the original assignation.⁷ In the latter case, if the subject be sublet, intimation to the sublessee is requisite, but if the subject be not sublet, it would appear that on principle and the analogy of a sublease, intimation to the proprietor is not necessary.⁸

SECTION V.—POSSESSION, NATURAL AND CIVIL.

When treating of possession upon the lease itself, it was shewn that it may be either natural or civil; the former consisting of the actual apprehension and occupation of the subject, and the latter of enjoying [479] it through the medium of another by levying the rents or otherwise drawing the profits.⁹ The same rule applies to possession under an assignation at common law. Where the cedent being in the natural possession the assignee comes into his place by occupation and cultivation or other use of the subject,

¹ 3 Ersk. v. 4.

² 2 Bell's Com. 18, Note; 3 Ersk. v.

⁴ Note; 3 Stair, i. 7, Note b (by Brodie).

³ 3 Stair, *ut sup.* Note (by Brodie).

⁴ 4 Ersk. ii. 9; Tait's Law of Evid. 218.

⁵ Bell's Com. 17, Note.

⁶ Bowack v. Croll, 1748, Mor. 1695, 15,280.

⁷ 3 Ersk. v. 1; 2 Jurid. Styl. 3d edit. 354-9.

⁸ Underwood v. Richardson, 1824, 3 S. 336.

⁹ *Sup.* chap. iv. sec. 10, art. 1 of this book, p. 429, and Hume's Dissertation added to his report of Grant v. Adamson, 1802, Decis. 813.

the former mode of completion exists. But the latter applies where the subject has been sublet, and where, natural possession being unattainable, the assignee can possess only by intimation to the sublessee and by levying the subrents. If after such intimation the question regarding the validity of the assignation before a term's rent becomes payable arises, the assignee would still be held to have attained civil possession, for by the intimation itself he had assumed the control of the sublessee's management; had put himself *in titulo* to sequester for current rents, and maintain other possessory actions; and, in short, had asserted his possession in every way of which the nature of the case admitted. Where (it has been said) the subtenant cannot pay, or his term of payment has not arrived at the date of the assignment, the assignee might sequester in security of the subrent. This procedure would be an intimation of his right to the subtenant, and forming a kind of judicial possession would be the nearest attainable approach to real possession. Where there could not be sequestration perhaps there might be sustained a formal intimation to the landlord, and the like to the subtenants as now debtors to the assignee. For such procedure was all that the assignee could do towards entering into possession.¹

Assignations of leases under the operation of the Statute 20 and 21 Vict. c. 26, are in a different position in law, as shall be shewn when the tenor and results of that Act are examined.²

SECTION VI.—ASSIGNATION MAY BE ABSOLUTE OR QUALIFIED.

An assignation of a lease may be either absolute or subject to qualification as being granted in trust or in security. Where it is of the latter kind the assignee is bound to grant a retrocession when the purposes of the trust have been fulfilled, the debt paid, or other obligation implemented. And such an assignation is said to be redeemable.³

An absolute assignation of a lease, as already indicated,⁴ divests the cedent of his right, and substitutes the assignee in his place. [480] In common parlance, and in technical⁵ and even judicial language,⁶ such an assignation has been called a sale of lease, and the consideration given has been denominated the price. Whether this

¹ Hume, *ut sup.*

² *Ut infra*, p. 510 *et seq.*

³ *Per curiam* in Brock v. Cabbell, 5 March 1830, F.C. 499, 8 S. 647, 2 D. and A. 345.

⁴ *Ut sup.* p. 493.

⁵ 2 Jurid. Styl. 2d edit. 265.

⁶ *Per* Lord Fullarton in Swan v. Baird and White, 12 Dec. 1836, 15 S. 251.

Art. 1. —
Absolute
assignation.

phraseology is strictly correct may be doubted, but it has been practically adopted, and accordingly there is inserted in the Style Books a form of "Articles of Roup," in terms of which the lease as well as the stock and cropping are to be exposed to sale. With relation to the lease, the conditions are, that a consideration of a specified nature shall be payable to the exposor (the cedent), and that the purchaser shall be bound to pay the tack duty stipulated by the lease to the landlord, and to implement the whole other conditions and obligations thereby incumbent on the tenant in so far as the same have not already been fulfilled.¹

Although an assignation should be *ex facie* absolute, yet the relative documents and dealings with the parties will be let in to shew that the intention was that it was to be in trust or security only, and where the evidence is such as fully to establish that such was the true intention, the cedent or his representatives will be held entitled to redeem.²

Art. 2.—
Qualified
assignation.

An assignation, qualified by having been granted in trust or in security, differs in its tenor from an absolute one by the introduction of the declaration of the purpose for which it has been granted, and the obligation on the assignee to retrocess the cedent. The declaration and relative obligation are sometimes inserted in *gremio* of the deed itself, and sometimes executed in the form of a separate back bond. The most common purpose for which such assignations have been used has been as a device to render leases securities for debt. The course has ordinarily been first to execute an assignation and intimate it to the landlord, and then for the assignee to grant a sublease to the cedent. In consequence, there being no change of possession, the credit of the cedent is not affected.

Policy of
making
leases avail-
able as
securities
for debt.

In the actual state of agricultural industry and of the investment of capital, an effective means of rendering leases available as securities was deemed highly advantageous. In improving agricultural leases of extraordinary duration, as of thirty-eight or fifty-seven years, or even in those of ordinary duration, as nineteen or twenty-one years, there must be a large outlay by the tenant in [481] meliorations of a nature comparatively permanent, the profits of which he cannot hope to derive until the duration shall have been, far advanced, or until within a few years of the expiration.

¹ Jurid. Styl. *ut sup.*

² Lyon v. Reid, 25 May 1830, 8 S. 789, 3 D. and A. 44, aff. 16 July 1832; 6 W. and S. 114; 2 March 1833, 11 S. 500. Walker's Exrs. v. Low's Trs. 14

Nov. 1833, F.C. 32, 12 S. 44. [This statement appears to be too broad, for such proof must be by writ or oath in ordinary circumstances.]

In leases of large manufactories much expense must be incurred in the erection of extensive and complicated machinery. And in leases of minerals, the cost of varied and continued operations is necessarily great. In these and similar cases, easily supposable, it may be of much importance to the lessee to procure a loan larger and more permanent than can be obtained on personal security. And he will naturally regard the subject in which his capital is invested, and from which his prospective profits are to be derived, as an available source of credit, either for replacing a portion of the capital which he has advanced, or for making such an addition to it as will render his future operations more productive. While the benefit of enabling the tenant to use his lease as a security is obvious, it is also clear that equal advantages would thus accrue to the landlord; for not only would the regular payment of the rent be more certain, and the subject-matter of the hypothec be augmented by the increased resources of the tenant, but the state of the subject would be permanently improved, and a solid addition made to the property of the owner. The capitalist, as well as the landlord and tenant, would be a gainer by the successful introduction of such a system. A great accumulation of capital has been created by causes which it would be out of place to detail, but the nature of which is apparently such that their effect must be steadily progressive. The result has been, and must continue to be, that difficulty will be more and more experienced in obtaining investments on good security, and at a remunerating rate of interest. If, therefore, leasehold property can be rendered available as a security, a new and important mode of investment will be open to the capitalist. These advantages have been so strongly recognised that repeated attempts were made to render leases valid securities consistently with the rules of law, but none of these efforts were successful; and while jurists acknowledged the importance and value of the object, they conceded that it was not advisable to act on the assumption that it could be validly accomplished, and they acknowledged that it was to be attained only through the interposition of the Legislature.¹

SECTION VII.—DOCTRINE OF THE TEXT WRITERS, AND PURPORT OF THE DECISIONS RELATIVE TO AN ASSIGNATION RETENTA POSSESSIONE.

As already indicated, the mode of completing an assignation so as to secure the right of the assignee against the landlord or his

¹ Third Report of the Law Commissioners for Scotland, 18 Jan. 1838, p. 21.
1 Bell's Com. 68.

[462] singular successor, or against a subsequent assignee or the cedent's creditors, involves practical questions of much importance. The main question is, whether the right can be completed by intimation merely, and without possession by the assignee, or, in other words, *possessio retenta* by the cedent. Notwithstanding much deliberation, both in the Court of Session and in the House of Lords, the validity or invalidity of such rights must, in a strict sense, be deemed to be still an open question, because in each instance discussed there existed special matter which, either in the Court below or in the Court of Appeal, was deemed to render a decision on principle unnecessary.

Art. I.—
Doctrines of
the text
writers.

The doctrine of the text writers may be gathered to be that the assignation cannot be completed by intimation to the landlord merely, without possession, either natural or civil. Stair says that leases, although they be truly personal rights of location, and constituted as real rights by statute only, yet intimation will not transmit them, but that there is a necessity of possession.¹ And Bankton holds that possession is necessary to secure an assignee against a singular successor.² Erskine introduces a modification of the doctrine; for he says that possession is as necessary for securing the transmission of a lease to an assignee as for securing that lease itself to the principal lessee, or at least there must be some publication by which the conveyance may be made known, so that third parties may not be ensnared by private or latent conveyances.³ No indication, however, is given of what nature that publication must be, nor, as there is no record for leases, what shall be deemed equipollent to registration. Ross deems possession necessary.⁴ Hume, in a short but valuable dissertation added to one of his Reports says, "there is truly much the same objection to this of pledging a lease and yet retaining the natural possession, though under a cover of a contract of subset, as there is to the pledging of a movable corpus and next day resuming the article in hire or deposit. In the one case as little as in the other is there any change of the natural possession or outward state of management to warn the lieges that any alteration has taken place in the character or value of the tenant's interest in his tack, and yet this interest is materially lowered, and the tenant is no longer entitled to the same credit with the neighbourhood as before." And he censures a case in which it had been supposed that a different doctrine had been indicated as evincing that considerations of expediency had "un-

Hume.

¹ 3 Stair, i. 6.

² 2 Bankt. ix. 4.

³ 2 Ersk. vi. 25.

⁴ 2 Ross' Lect. 506.

duly [483] prevailed over the known and wholesome principle of our common law."¹ Bell says, that "where a tenant not prohibited has assigned, the assignation is not effectually completed by intimation to the landlord without possession. But the possession of the assignee may be civil as well as natural, and therefore, if his subtenant holds the lands under a written lease it will be enough. The only difficulty is the ostensible ownership from continued possession where the cedent is subtenant. This would be fatal in movables; but the tenant's right in land has two points, written title and possession, without the union of which there is no legal ground of credit or of reputed ownership."² In the other modern treatises the doctrine is expressed as in the general proposition stated at the beginning of this article.³

Bell.

In the earliest reported case the doctrine of the necessity of possession is combined with an indication that intimation to the landlord, and enrolment in his rental-book, might have been a sufficient completion. A tenant having a lease of three nineteen years assigned it to a creditor, and took from him a sublease by which he became bound to pay the creditor a certain sum of additional rent, and also to relieve him of the rent due to the landlord. The original tenant thus remained in possession without the appearance of any matter which indicated the transaction. Another creditor afterwards adjudged the lease, and in a competition it was objected to the assignee's right that his assignation was neither intimated nor clothed with possession. The Court directed inquiry to be made whether any rent had been paid by the sublessee, either to the assignee or to a creditor, who by the transaction was to get a certain share of the surplus rent; or what evidence the assignee could adduce that any part of the yearly rent payable to the landlord had been paid on his account as assignee to the lease, or that he had been enrolled as tenant in the landlord's rental-book. No evidence on these matters having been produced, the adjudger was preferred, although it was pleaded for the assignee that the sublessee's possession was his possession. The principle which is reported as having governed the decision was, that although civil possession by levying the rents comes in place of the natural possession where the latter is unattainable, or if the assignee shall be considered only as an assignee to the rents [484] during the currency of the tenant's lease, it must, as in other

Art. 2.—
Doctrine of
the deci-
sions.

¹ Grant v. Adamson, 1802, Hume, 811-13.

² 1 Bell's Com. 66-7, 755-6.

³ Bell's Pr. 1209-12; More's Notes,

ccl.; 1 Bell on Leases, 451-2; 2 Ersk. vi. 25, Ivory's Note; 2 Stair, ix. 43, art. 3, note a (by Brodie).

assignments, be completed by intimation to the landlord; but in no case can a transmission be deemed complete where no act intervenes other than what passes between the grantor and the receiver, and, as in the actual case, is known to nobody but themselves.¹

The next case related to the assignment of a sublease, and therefore the details of it shall be given when treating of the sublease. But in it there was doctrine laid down which is here in point. It was said, *first*, that possession is so far essential to the conveyance of a lease in security of a debt that without it the assignee has only a personal right, and therefore a subsequent assignee or adjudger getting first into possession will be preferred. And *second*, that when the principal lessee assigns his lease, the right of the assignee is completed by intimation to the sublessees requiring them to pay their rent to him.² In a subsequent case it was deemed that a general rule had been thus laid down. Where a farm under lease had been sublet, it was decided that an assignment to the lease may be made to another which will be effectual if he possess by levying the subrents. It was observed on the Bench that there had been many questions as to the mode of completing an assignment to a lease, but there can be no mode more effectual than possession.³ In the actual case it was observed that there was all the possession which was attainable, viz. the possession of the subrents, which also implies intimation to the subtenants; and it was distinctly held that it had been settled in the previous case⁴ that possession is the proper course of completing the assignment.⁵ The same doctrine was laid down in a subsequent case, which also related to a sublease, and therefore shall be detailed hereafter.⁶

But the authority of these precedents was apparently impaired in a subsequent case, both by a statement that the leading case had been incorrectly reported, and by a judgment ostensibly involving a different doctrine. The *gist* of this subsequent case⁷ was that a right to a lease by assignment is completed by an entry of the assignee's name as tenant in the landlord's rental book, where, in fact, no possession had followed upon the assignment, but where the subjects had been sublet by the assignee to the cedent. The [485] argument against the validity proceeded upon the necessity of possession as laid down in the previous cases. The argument

¹ Wallace v. Campbell, 1750, Mor. 2805-12, 15, 282, Elch. (Tack) No. 17.

² Hardie Douglas v. Cra. of Hay, 1794, Mor. 2802-4, Bell's Cases 50.

³ Hardie Douglas v. Hay, *ut sup.*

⁴ Syme's Tra. v. Fidler, 1806, Mor. App., Tack, 13, 1 Bell's Com. 67, Note.

⁵ By Lord Balgray, who had been of counsel in the case of Hardie Douglas v. Hay, *ut sup.*

⁶ Grant v. Adamson, *ut sup.*

⁷ Yeoman v. Elliot and Foster, 2 Feb. 1813, F.C. 149.

in favour of the validity was rested upon the ground of the entry in the rental book of the landlord as equivalent to intimation, and sufficient to complete the right under the assignation. For (it was argued) if such an entry had been proved in the leading case,¹ the decision would have been different. It was held, *per curiam*, that the right to a lease is transferable, like all other personal rights, by assignation, and the transference is completed by intimation to the landlord, the only other person concerned; that it is of no consequence how the intimation is made, if it be acknowledged that it was made; that the assignation may be secret, known only to the parties to the transaction, but that this cannot be helped as it arises from the nature of the right; and that even where there is a sublessee, he may pay his rent without any one knowing to whom, or who is in right of the lease. The case is reported so as to give an impression that the Court held that mere intimation to the landlord, and an entry in his rental book of the assignee's name, were sufficient to complete the transference. Doubts of its soundness were entertained.² In consequence it was observed, that the assignation of a lease is well completed by intimation to the sublessee when it is truly only an assignation of rents, and the sublessee is the debtor; but that there seem to be no *termini habiles* for intimation to the landlord to the effect of transferring a lease, and the argument that otherwise there are no means of borrowing money on the security of the lease, is fit only for the Legislature. These observations induced a reconsideration of the doctrine.³

The facility afforded to credit by borrowing upon leasehold subjects without altering the possession, gave rise to transactions in which the law was fully canvassed, but which did not issue in the establishment of a rule. A, the lessee of a manufacturing subject, borrowed money from B, a banking company, upon the security of an assignation to a lease *ex facie* absolute. Intimation of the assignation was made by B to the landlord. B granted in favour of A a sublease, which, however, was informal, being neither authenticated or specifying any rent. A continued his possession unchanged during three years subsequent to the assignation; but having been then sequestrated, his trustee brought an action for declaring the invalidity of the assignation, and his right as trustee to the lease. In the argument, reliance was had upon an alleged [486] entry in the books of the factor of the landlord as bringing the case within the rule of the immediately preceding decision.⁴

¹ Wallace v. Campbell, *ut sup.*

² 1 Bell's Com. 67, Note 2.

³ Bell's Com. *ut sup.*; Brock v. Cabbell,

1822, *ut infra*; Inglis & Co. v. Paul,

1829, *ut infra*.

⁴ Yeoman v. Elliot and Foster, *ut sup.*

Brock v.
Cabbell.

"But the Court were of opinion that the case was altogether different from the preceding one, where there was a deletion of the cedent's name from the rental book of a great lauded proprietor, which was almost a public record,¹ and an insertion of the assignee as tenant, and a regular sublease granted with a fixed subrent; while in the present case, although the assignation was intimated, there was nothing but a memorandum in the private books of the factor, the cedent still continuing to pay the rents as before, and the landlord never considering the assignees as tenants until the bankruptcy; and that the sublease was an improbate writing, and had no subrent specified in it, and there appeared to be no intention that there should be any change upon the possession." The Court therefore held that the assignation had not been completed as against creditors. The *gist* of the decision was the invalidity of the sublease to sustain the possession as for the assignees, and under their authority.²

Brock v.
Cabbell—
continued.

The case was appealed, but the same principle having emerged in it which had apparently emerged in a case previously argued before the House of Lords, and remitted for reconsideration by the whole Court, a similar remit was made in it. When reconsidered, the former judgment was adhered to, because it was in conformity with the opinions of the great majority of the Judges. In consequence, the marginal abstract of the report bears, that an "assignation of a lease made for the purpose of creating a security in favour of the assignee, by interposing him as a principal tenant between the landlord and the cedent, but not having been followed by any possession, either natural or civil, on the part of the assignee, although intimated to the landlord, is ineffectual against the creditors of the cedent." The formal terms of the judgment are, "that under the whole circumstances of the case the assignation founded on cannot be effectual against the pursuer, the trustee for the creditors of the cedent," &c. But the general doctrine laid down as necessary to render an assignation effectual, and within the rule of which the facts did not come, appears to sanction the proposition contained in the [487] marginal abstract of the report. When the transference of a lease depends on natural

¹ Duke of Buccleuch's rental book. The *dictum* that the book of any private person, however large his property or high his rank, could be at all compared to a public record, or that there was any distinction between it and the ordinary book of a factor, appears to be so untenable that it may rather be deemed that the true ground of the decision was, as

indicated by Hume in *Grant v. Adamson, ut sup.*, viz. "The convenience of business, and the practical advantage of accommodating a tenant with the use of his lease as a subject of credit."

² Brock v. Cabbell, 29 Nov. 1823; F.C. 31, 2 S. 52, 1 Bell's Com. 67, Note; remitted 1828, 3 W. and S. 75, 84.

possession (it was laid down) a difficulty can seldom occur; but it is otherwise with regard to civil possession, which is of a less palpable nature and not so well defined in law. If a principal tenant wishing to transfer his lease, should intimate an assignation of it to his landlord and to his subtenant, and if the subtenant after this should pay the rent to the assignee, it is clear that the real right in the assignee would be complete. Also, if the question should arise before a term's rent became payable, the assignee might still be held to have attained civil possession. The case was again appealed, and the judgment affirmed; but the House of Lords did not consider it necessary to decide the question whether intimation without possession was sufficient, being satisfied (and in this their Lordships concurred with the majority of the Judges in the Court below) that under the circumstances there had not been vested in the banking company a real *bona fide* security.¹

While this case was in dependence, other cases arose involving the same principles. An assignation of a partner's share of profits and stock, in relief of a private obligation come under by the assignee, who was the only other partner of the company, and was also landlord in certain leases of which the joint stock chiefly consisted, was found effectual in a question with the creditors of the cedent, who had become bankrupt, the assignee having previously got possession of certain company bills in virtue of the assignation; and a direction having been given by both partners to the manager of the company to make the drafts on the debtors of the company payable to the assignee, although no kind of intimation of the conveyance was given as to who was in the actual possession of the subjects of the leases.² When this case originally occurred it was held to involve the question whether intimation without possession was sufficient. The judgment having been that the assignation was not completed to the effect of giving a preference to the assignee in a question with the creditors of the cedent, on appeal the House of Lords thought that the decision was inconsistent with what was then deemed the leading case,³ and therefore remitted the cause for the reconsideration of the whole Court.

Russell v.
Earl of
Breadal-
bane.

When it was reconsidered, additional documentary evidence was produced, and the judgment already stated was pronounced. But that judgment proceeded upon the special matter, and under an express declaration that the question as to the mode of completing an [488] assignation of a lease did not arise in the case. The

¹ Brock v. Cabbell, 5 March 1830, F.C. 499, 8 S. 647, 2 D. and A. 346; aff. 1881, 5 W. and S. 476.

² S. 62, 3 June 1827; F.C. 584; 5 S. 891 [remitted, 1825, 1 W. and S. 621.]

³ Yeoman v. Elliot and Foster, *ut sup.*

⁴ Russell v. E. of Breadalbane, 1822,

and "in security of the personal obligation before written," he assigns "heritably but redeemably, as after mentioned, yet irredeemably in the event of a sale by virtue hereof, a lease of" subjects described, the title to which is to be set forth as in the preceding schedule; the rents and writs are assigned and warrandice granted; and the deed terminates thus:—"And I reserve power of redemption, and I oblige myself and my foreshaids for the expenses of assigning and discharging this security; and on default of payment I grant power of sale; and I consent to registration for preservation and execution;" and with a testing clause in the usual form.

By section fifth, where the person in right of the lease or the assignation in security is not the original lessee, or a general assignee, he shall, before presenting such lease or assignation for registration, expedite an instrument under the hands of a notary-public, according to a form in schedule C.

The Keeper of the Register, on such notarial instrument being produced to him, but not otherwise, shall record the lease or the assignation in security along with the instrument.

By section sixth the assignation in security shall, when recorded, be transferable in whole or in part by translation, according to a form in schedule D.

Art. 3.—
Title of
heir, creditor,
or
trustee.

[495] By the seventh section it is [made] competent for the heir of any party who shall have died vested in the right of any recorded lease or assignation in security, "to make up his title thereto by a writ of acknowledgment" from the proprietor vested in the lands leased, or from the party appearing on the register as in absolute right of the lease assigned in security, [according to a form in schedule E].

The recording of the writ of acknowledgment in the register in which the lease or assignation in security is recorded, completes the title of the heir to the lease or assignation. And it is provided that no defect in the title of the proprietor or party granting the writ shall affect the right or title of such heir.

An heir (section eighth), by general or special service, or the general disponee of a party who shall have died fully vested in the right of a recorded lease or assignation in security, may expedite a notarial instrument according to scheduled forms [schedule F].

[496] The recording of such instrument in the register in which such lease is recorded shall complete the title of the heir or disponee to the lease or assignation in security.

By section ninth, where an assignee has died without recording the assignation, the mode of making up his title to it is by exped-

ing a notarial instrument of the tenor which has now been described [Schedule F]; and the Keeper of the Register, on such notarial instrument being presented to him, but not otherwise, shall record such assignation in security or translation, together with the instrument.

When (section tenth) an adjudication of a recorded lease or assignation in security shall have been obtained against the party vested in the right, or his heir, the recording of the abbreviate of adjudication in the register in which the lease is recorded shall complete the right of the adjudger to such lease or assignation in security.

In terms of section tenth, the trustee in a sequestrated estate may expedite a notarial instrument according to scheduled form, [Schedule F] and the recording of the instrument in the register in which the lease is recorded completes the right of the trustee to the lease or assignation in security.

By section twelfth, all leases, assignations, and assignations in security, executed after the passing of the Act, and all translations, adjudications of recorded leases, or assignations in security, shall in competition be preferable according to their dates of recording.

Art. 4.—
Preferences.

Conformably with the thirteenth section, on a production to the Keeper of the Register of a renunciation of a lease or a discharge of an assignation in security by or on behalf of the party registered, as a right of such a lease or assignation he shall forth with duly record the same. The renunciation and the discharge must be according to scheduled forms [Schedules G and H]. By the former, the granter renounces, as from a specified term, in favour of the grantee, a recorded lease described; and if the party renouncing is not the original lessee, it is set forth that his title is recorded in the Statutory Register. By the latter [497] the granter discharges the bond and assignation described, and declares to be disburdened thereof a recorded lease described.

Art. 5.—
Renunciations and other discharges.

In terms of section fourteenth, on the production to the Keeper of the Register of an extract of a decree of reduction of a lease, or any of the other statutory deeds or instruments described and enumerated, he shall forthwith record the same.

In terms of section fifteenth, leases and the other statutory deeds and instruments enumerated, and other writs duly presented for registration in pursuance of this Act, shall be forthwith shortly entered in the Minute-Book of the Register in common form, and

Art. 6.—
Mode of registering.

shall, with all due despatch be fully registered and thereafter re-delivered to the parties, with certificates of registration thereon, which shall be probative of such registration; and such certificate shall specify the date of presentation, and the book and folio in which the ingrossment has been made, and being subscribed by the Keeper of the Register; and the date of entry in the Minute-Book shall be held to be the date of registration; and extracts of writs so registered shall make faith in all cases in like manner as the writs registered, except where the writs are offered to be improven.

By section nineteenth, where any lease registrable under the Act shall, before the passing thereof, have been recorded in the Books of Council and Session, or in the books of any sheriff or burgh court, the production to the Keeper of the Register of an extract of such lease shall be a sufficient warrant for him to record the same, and he shall record it, and the recording shall be as valid and effectual as if the original lease had been presented to him.

Art. 7.—
*Legal effects
of the regis-
tration and
other pro-
cedure.*

In terms of section second, leases valid and binding in a question with the grantor, registrable and recorded under the Act at or after the date of entry, shall be valid against any singular successor in the subjects let the date of whose infeftment is posterior to that of the registration; but, except for the purposes of the Act, it shall not be necessary to record leases in themselves valid against singular successors. [The sixteenth section declares that the registration of an assignation completes the right as effectually as if the assignee had entered into possession.¹]

Conformably with section sixth, the recording of the translation of an assignation in security produces the following results in law:—*First*, the grantee shall be fully and effectually vested with the rights of the grantor to the extent assigned. *Second*, the creditor or party in right of the assignation in security, without prejudice [498] to the exercise of the stipulated power of sale, shall be entitled, in default of payment of the capital or interest for six months after it shall become due, to apply to the Sheriff for a warrant to enter into possession of the subjects leased. *Third*, the Sheriff, after intimation to the lessee for the time being and to the landlord, shall, if he see cause, grant such warrant, which shall be a sufficient title for the creditor or party to enter into possession of the subjects, and uplift the rent from subtenants, and to sublet. But *Fourth*, no creditor, unless and until he so enters into posses-

¹ [See *Rodger v. Crawford*, 9 Nov. 1867, 6 Macph. 24.]

sion, shall be personally liable to the landlord in any of the obligations and prestations of the lease.

The twentieth section enacts that the import of the clauses shall have the same meaning and effect as is declared by the 10 and 11 Vict. c. 50, sections first and second, to belong to the corresponding schedules in that Act; and that the procedure thereby prescribed for a sale under a bond and disposition in security shall be applicable to the sale of lease under an assignation in security. For the terms of these imported sections reference is made to the statute.¹

Art. 8.—
Imports—
tion of the
10 and 11
Vict. c. 50.

This statute is in extensive practical operation.² But in so far as has been traced, there is no decision by which the working of its machinery and phraseology has been brought to the test. Both in important particulars are new, and are not to be easily reconciled with the recognised rules of the law of Scotland. While it would be unsound and unadvisable to search curiously for the difficulties of construction and application which may emerge, some of them are so much on the surface that observation is unavoidable.³

1st, The most serious difficulty will be created by the novel enactments embodied in the seventh, eighth, and ninth sections. The first of these sections directs that the heir of any party who shall have died vested in right of any lease shall make up his title by a writ of acknowledgment. Assuming that the phraseology "died vested in right" is recognisable, which may be doubted, there is here the introduction into the succession, by lease, of what is closely analogous [499] to a service. The known rule of the common law is that the heir succeeds to a lease without a service.⁴ The right passes directly from the dead to the living without the intervention of any judicial procedure or ministerial form, or of any deed or instrument. This rule works well, and it is not easy to see what advantage is to be derived from this statutory introduction of the writ of acknowledgment by which the proprietor recognises the right of the heir. No additional validity is given to it by that right, nor does it facilitate the execution of the purposes of the Act.⁵

¹ 10 and 11 Vict. secs. 1 and 2.

² The Author has so learned by communication with the keepers of the registers.

³ Shaw's Bell's Com. vol. ii. p. 191-2, in which there is an enumeration of the

matters which are or may be deemed liable to objection or question.

⁴ *Supra*, book i. chap. vii. sec. 2, art. 4, p. 233.

⁵ Bell's Com. *ut sup.*

2d, A difficulty, so grave as to be inextricable, arises out of the enactment (section eighth), in which the heir who shall have been served by a special or a general service may, by expediting and recording a notarial instrument, complete his title as heir to the lease. In this section there is the same difficulty as in the former, arising from the introduction of procedure to transfer and complete the right, but there remains a still more serious difficulty. A service is purely the creature of feudalism, the purpose of which is to take the *hereditas jacens* out of the party who died vested with the feudal right. But in or to a lease there can be no such right, and there can be no *hereditas jacens*, because *unico contextu* with the death of the lessee the right passes to his heir. Conformably with the existing enactments and schedules, a service is impracticable.¹

3d, By the ninth section, provision is made as to the mode in which the title of the heir is to be made up. Where the assignation shall not have been registered in the lifetime of the grantee, power to the heir to register after the death of the original grantee might have been advisable to obviate any doubt as to the heir's right to avail himself of the statute; but in the form in which it exists there is a repetition of the anomaly involved in the provisions of the seventh section.²

4th, By the seventeenth section, leases containing an obligation upon the granter to renew the same from time to time, at fixed periods, or upon the termination of a life or lives, or otherwise, are within the purview of the Act, provided the duration shall be for thirty-one years or upwards. This enactment, it may be deemed, excludes a lease for the lifetime of the lessee, for such a lease cannot aptly be included under the phraseology. There is difficulty in holding that such an exclusion is contemplated; but if, presuming on such intendment, the lessee tender such a lease for registration, it may be doubted whether it could warrantably be registered, or, if registered, whether the lessee would be entitled to the benefits of the statute.³

SECTION X.—DECISIONS RELATIVE TO TRANSLATION AND RETROCESSION.

[500] There have been few cases applicable to translation and retrocession, but it has been decided, *first*, that a tack being set of lands bearing a reversion on payment of a certain sum, which tack

¹ Bell's Com. *ut sup.*

² Bell's Com. *ut sup.*

³ Bell's Com. *ut sup.*

the tacksman assigned to his wife for her liferent use, but the setter reduced by paying the sum, and taking translation from the original tacksman, was thereby evacuated *in totum*, he having paid his money *bona fide*, and not being obliged to know the wife's translation.¹ *Second*, A lease excluded assignees and subtenants, except with the landlord's consent; but an assignation was granted by the tenant to which the landlord gave his consent in writing. The assignee alleged that the assignation was only in security, but it was held that the assignee was substituted for the original tenant; that a retrocession could not be effectually made without the consent of the landlord; and that the assignee remained bound to him in terms of the lease, notwithstanding a decree of reduction of the lease, obtained by the trustee on the sequestrated estate of the original tenant, as the result of a compromise with the assignee.²

CHAPTER XIV.

SUBLEASE.

SECTION I.—CONSTITUTION, FORM, AND SOLEMNITIES OF SUBLEASE.

A sublease is a deed by which the lessee lets the subject to another, to hold it under him, paying a rent to him, and performing the stipulations pretable by the lease. In this relation the principal lessee occupies the place of the landlord, and the sublessee that of the tenant.³ The constitution and other requisites of the sublease shall now be examined, leaving for future discussion the mutual rights and obligations which are created under it.

The same general doctrine and rules operate (in so far as applicable) in the constitution of the sublease as in that of the lease, and consequently the decisions proceed on the same *data* and give [501] the same results. The validity of a sublease was sustained as against the landlord although the lease excluded assignees and subtenants without the landlord's consent in writing, and although there was no direct written consent. The sublease was for twenty-two years at a specified rent, and applied to a large proportion of

¹ *Burnet v. Fraser*, 1673, Mor. 13,470.

² *2 Stair*, ix. 22; *2 Bankt* ix. 17; *2*

³ *Ramsay v. Commercial Bank*, 20 *Ersk* iv. 34; *2 Ross' Lect* 506-7.

Jan. 1842, 4 D., 14 Jur. 152.

Art. 1.—
Constitution of the
sublease.

the farm. The consent of the landlord, and therefore the validity as against him, were held to have been established by inquiries made by him about the character and substance of the subtenant before he was admitted to possession, occupation for more than ten years, payment of the rents to the landlord on receipts from him as for money paid by the subtenant on his own account, and acquiescence in the continuance of the subtenant after a decree of removing had been obtained against the principal tenant, who had left the country.¹ So, in a question with the landlord, a sublease was held to be valid by reason of the sublessee's open and undisturbed possession for several years, a letter from the landlord's factor directing the subtenant to pay the rent to him for the future, and receipts by the factor acknowledging payment of rent from the subtenant, directly so styled.²

In other cases the constitution was deemed not to have been established. After a change of tenancy the subtenant of the outgoing tenant was allowed to continue in possession. Afterwards an action of removing was raised against him by the new tenant and the landlord, in which a decree in absence was obtained. A negotiation for a sublease was then commenced, and a cautioner granted a letter of guarantee for the rent for a prospective but indefinite period, and also his bill for the rent for a particular year. The tenant accepted of the guarantee. The intended subtenant having afterwards refused to sign the missive letter transmitted to him by the tenant, the latter returned the letter of guarantee and bill and the negotiation was broken off. Subsequently the party claiming as subtenant brought the decree of removing under review, and pleaded on the matters which have been detailed, and also on a letter from the tenant containing an alleged recognition of him as subtenant, and maintained that he had a sublease during the currency of the principal lease, which was for fifteen years. It was held that there had been no completed agreement for a sublease for a term of years.³ So a landlord received rent from a party who had obtained a sublease, but who was cautioner in the lease. But the receipts were not granted in his name, and it was held that the payments did not validate the sublease.⁴ As a lessee is bound, as for a term of years, by an [502] offer and acceptance involving prospective conditions, so a sublessee is bound in the like manner.⁵

¹ Dalrymple Hay v. Mactier and Gilchrist, 1806, Hume 836.

² Maule v. Robb and Fitchett, 1807, Hume 836.

³ Fraser v. Fraser, 9 March 1833, 11 S. 565.

⁴ E. Elgin's Tra. v. Walls, 14 May 1833, F.C. 347, 11 S. 585.

⁵ Russell v. Freen, 14 May 1835, F.C. 486, 13 S. 752. See above, chap. iv. sec. 10, art. 2, p. 435.

The marginal abstract of a reported case bears "terms of an agreement as to the occupation of a dairy farm, which held to constitute a sublease."¹ This case relates to a contract of "bowing of cows," and it was shewn, when treating of that contract, that the tenor of the judgment does not warrant the inference indicated in the report.²

1st, The sublease commences by describing the parties, viz. the principal lessee of the subjects on the one part, and the sublessee on the other. 2d, In consideration of the rent and other obligations, the granter "subsets," and in tack and assedation "lets," to the sublessee and his heirs (or to whomsoever he is empowered to sublet) either the whole or a part of the subjects described. 3d, The duration is then inserted according to a specified number of years, qualified as being the remaining years still to run of the principal lease, or so many of them, or the more general form is adopted of making the duration commensurate with that of the principal lease. In the same clause the term of entry is set forth. 4th, A clause is then inserted declaring that the sublease is granted under the conditions specified in the principal lease, to which special reference is made, and an extract of which is declared, to be delivered to the sublessee. 5th, The clause of absolute warrantice. 6th, The clause of rent, specifying the amount and nature of the rent, and the terms of payment. In many instances it happens that the rent paid by the sublessee is larger than that paid by the principal lessee, and it is then styled surplus rent. 7th, The sublessee accepts of the houses, fences, and other accommodations in their actual state as tenantable and sufficient, and obliges himself so to leave them at the expiration of the sublease. A reference to the details of the principal lease is ordinarily made. 8th, The sublessee obliges himself to implement the whole other stipulations and prestations incumbent upon the lessee, as specified in the principal lease, which are held as repeated, but with the exception of the payment of the rent due by the lessee to the proprietor, which is declared to be payable by the lessee out of the subrent. 9th, The lessee assigns to the sublessee the whole obligations and stipulations in his favour which the principal lease contains. And 10th, The clause of mutual implement. These clauses are followed by those common to all deeds.³

Art. 2.—
Form of the
sublease.

[503] A sublease requires the same solemnities as a principal

¹ Goldie v. Oswald and Kennedy, 25 Jan. 1839, 1 D. 426.

² Sup., book ii. chap. xviii. p. 358.

³ 1 Jurid. Styl. 4th edit. 536.

Art. 3.—
Solemnities.

lease,¹ and reference is accordingly made to the details concerning the principal lease.² But *first*, in every question of possession with a proprietor or others, the sublessee must instruct the right of the person under whom he possesses; and therefore, as set forth in the style, there is delivered to him an extract of the principal lease.³ And *second*, When articles of set are referred to in a sublease, the sublessee's title is deemed incomplete without them, and therefore their tenor must be instructed if an action be raised.⁴

Art. 4.—
Mode of
completion
of sublease.

A sublessee, like the principal lessee, completes his real right by possession, which renders him secure against the singular successors of the landlord, and against any subsequent sublease granted by the principal lessee.⁵ In consequence—*first*, no action of reduction raised by the proprietor against the lessee can injure the sublessee in possession if he be not made a party to the suit.⁶ *Second*, Neither will a sublessee lose his right although the principal lessee should desert his lease or renounce his right to it in favour of the proprietor.⁷ *Third*, When a missive of sublease is informal or irregular, possession gives to the sublessee a right to possess in a question between him and the principal tenant; but it was held that it did not confer a title to sue the landlord's executors for damages under the warrandice in the principal lease to "heirs, assignees, and subtenants," on its being set aside by a succeeding heir to the granter, as in contravention of the entail of the lands.⁸ *Fourth*, The sublessee must instruct the right under which he possesses.⁹ The right of the sublessee, like that of the principal lessee, must stand or fall with the title of the proprietor.¹⁰ *Fifth*, A lessee having granted a sublease, and thereafter renounced the lease in favour of the proprietor, the proprietor was preferred to the sublessee; for although the sublessee was in the natural possession before the date of the renunciation, his possession had been upon a separate title, and not *qua* sublessee; and as no intimation of the sublease [504] had been made to the proprietor, he might lawfully take a renunciation from his own tenant.¹¹ And *Sixth*, A sublessee having borrowed money, granted a security in the form

¹ 2 Bankt. ix. 17; 2 Ersk. vi. 34; 2 Ross' Lect. 508; Tait's Jus. Peace, 388.

² Sup. chap. iv. sec. 4, p. 385, *et seq.*

³ 2 Ross' Lect. 507.

⁴ Crighton v. Laing Mason, 1828, 6 S. 403-4.

⁵ 2 Stair, ix. 22; 2 Mackenzie's Inst. vi. 8; 2 Bankt. ix. 17; 2 Ersk. vi. 34; 1 Bell's Com. 66; 1 Bell on Leases, 471-3.

⁶ Stair and Ersk. *ut sup.*; 1 Bell on

Leases, 470-1. E. Galloway v. M'Culloch, 1628, Mor. 7833.

⁷ Stair, Bankt., Ersk., and Bell on Leases, *ut sup.* E. Morton v. Tenants, 1625; Mor. 15,228.

⁸ Hutchison v. Exrs. of D. of Queensberry, 1828, 6 S. 849.

⁹ Bankt. *ut sup.*; 2 Ross' Lect. 507.

¹⁰ 1 Bell on Leases, 470.

¹¹ Earl of Morton, *cit.*

of a sublease. The grantee did not enter into possession at the term specified, nor did he intimate to the landlord. He afterwards made a judicial application for the summary removal of the granter, and authority to take possession. Meanwhile the granter had executed a conveyance, including his sublease, in favour of trustees, for his creditors, who completed their right by possession and intimation to the landlord. In a competition between the grantee and the trustees of the granter, the latter were preferred.¹

SECTION II.—DURATION.

If no specific period of duration be inserted, but a reference be made to the duration of the principal lease, that of the sublease will be deemed commensurate with that of the principal, or if the principal shall be reduced, with what would have been its duration had it expired naturally. In conformity, it was decided that where during the dependence of an appeal of a decree of reduction of the principal lease (afterwards affirmed) a sublease was granted from a given period "to the termination" of the principal lease, the duration was the same as if the terms, "expiry," or "for all the remaining years of the lease," had been inserted.² And where, in a similar position, a sublease was granted from a period specified for the length of the principal lease, it was held that the period for which the sublease was granted was that stipulated in the principal lease had it been allowed to come to a natural termination.³

If the duration be dependent upon a contingency, the sublease will be held to expire, and all claims by the sublessee be deemed to cease when the contingency emerges. A tenant whose lease was under reduction, having sublet, with an obligation on the sublessee to remove when required on the lease being reduced, it was decided that the sublessee had no claim of damages against the principal lessee in consequence of having been deprived of six years of his sublease.⁴

SECTION III.—ASSIGNATION AND RENUNCIATION OF SUBLEASE.

[505] A sublease, like a principal lease, may be assigned, or by renunciation the principal lessee may be reinvested in it. The

¹ Grant v. Adamson, 1802, Hume 810.

² Middleton v. Yorton, 1826, 5 S. 162.

³ M. and G. Middleton v. Megget, 1828, 7 S. 76.

⁴ Laidlaw v. Wilson, 4 Feb. 1830, 8 S. 440, 2 D. and A. 231.

form and other solemnities requisite for assigning a sublease are the same as in the assignation of the principal lease. It has been laid down that in assigning a sublease, intimation to the principal tenant is not sufficient, but that the right must be completed by possession.¹

In one case a contrary doctrine has been supposed to have been adopted, and an assignation to a sublease in security of a debt intimated to the principal lessee, but on which no possession had followed, was supposed to have been held to form a valid ground of preference against the personal creditors of the cedent.² But in that case no judgment to that effect was pronounced. The case was a multiplepinding relative to the price of a sublease sold, and the competing parties were the assignees to the sublease, who had intimated to the principal lessee and personal creditors. The latter had done no diligence, but claimed under a trust-deed, which declared that the rights and preferences already acquired should not be affected by it. This trust-deed, the Court held, could not affect the rights of creditors previously acquired, and therefore they preferred the assignee to the trustee. It was expressly laid down that without possession the right is only personal. Intimation alone therefore could not complete it in a competition with a claimant under a real right, whatever effect it might have where the competition was with personal creditors who had not done diligence. The decision accordingly has not been deemed as establishing the doctrine of completion by intimation.³ The report of the decision is apparently incorrect; and in a subsequent case it was said that it was so.⁴ The rule to be adopted relative to the completion of the assignation of a sublease must be held to be governed by the principles and results already detailed relative to the completion of the assignation of a principal lease.⁵

Renunciation.

Where a sublessee renounced his right to the principal lessee, it was held that the renunciation did not require to be intimated to the proprietor. A, principal lessee, granted a sublease to B, and B conveyed the sublease to C, who obtained possession. From him B again acquired it by retrocession, and then renounced it to A for an onerous consideration. Afterwards B executed a disposition [506] *omnium bonorum* in favour of trustees for behoof of his creditors, referring to an inventory in which this sublease was not inserted. A did not obtain possession in consequence of C having

¹ 1 Bell's Com. 67.

² Hardie Douglas v. Tra. for Hay's Cra., 1794, Mor. 2602.

³ Bell's Com. *ut sup.*; 2 Ersk. vi. 25, Note (by Ivory) 102.

⁴ Per Lord Balgray (who had been of counsel in it) in *Yeoman v. Elliot* and *Foster*, 2 Feb. 1813, F.C. 149.

⁵ *Supra*, chap. xiii. sec. 3.

improperly refused to remove; but upon the trustee of B proposing to sell the right in the sublease, A brought a declarator of his right to it, and that it was not comprehended under the disposition *omnium bonorum*. The necessity of intimation to the landlord of the renunciation to the principal lessee having been pleaded in defence, the plea was overruled, and it was decided that the disposition *omnium bonorum* did not include the sublease.¹ And subsequently the principal lessee, his name having been entered in the rental book of the proprietor, was found preferable to a creditor adjudging in virtue of a bond and assignation in security granted by the sublessee.²

CHAPTER IV.

TACIT RELOCATION.

1st, The nature of tacit relocation; 2d, the kinds of leases, and the subjects to which it applies; and 3d, the persons against whom it operates—shall be considered.

SECTION I.—NATURE OF TACIT RELOCATION.

Tacit relocation is a presumed renovation of the lease for the ensuing year upon the same terms as those of the preceding year, operating under a lease either verbal or written, and arising from the implied consent of parties, when neither the lessor warns the lessee to remove nor the lessee renounces in due time.³ It is well defined by Barbeyrac—"Le contract de louage se renouvelle par une *reconduction* tacite, lors que, le bail étant expiré, le preneur continue de jouir de la chose louée, sans que le bailleur s'y oppose. Car, en ce cas-là, l'un et l'autre est censé proroger le contract pour le même tems et aux mêmes conditions."⁴ In the next Book the nature and details of the warning or renunciation requisite shall be explained as portions of the doctrine of the dissolution of

¹ Underwood v. Richardson, 1824, 3 S. 336.

² J. & M. Marston v. Underwood, 1827, 5 S. 200.

³ Balfour 206, c. xlii.; 1 Craig, xi. 4, and 2 Craig, ix. 10; 2 Stair, ix. 23, and 4 Stair, xxvi. 14, and 4 Stair, xxvi. 17,

Note c (by Brodie); 2 Mackenz. Inst. vi. 7; 2 Bankt. ix. 32; 2 Erak. vi. 35; Bell's Pr. 1265; 1 Jurid. Styl. 2d edit. 675.

⁴ Puffendorf, Droit du Gens, par Barbeyrac, liv. v. chap. vi. sec. 1, note 2.

the contract of lease. [507] But meanwhile, tacit relocation, as forming a branch of the constitution of that contract, shall be discussed,

Roman and
foreign
laws.

The doctrine of tacit location has been borrowed from the Roman law, by which it was held to be constituted by consent alone, created by the landlord allowing the tenant to remain after the definite period of the contract of location had expired. A different rule as to the implied duration appears to have existed in different descriptions of subjects. In agricultural subjects a year was the period. In the woods or other subjects, to gather the fruits of which required a tract of time, the renewed duration was for two, four, or five years. But in urban tenements the renewal was *de die in diem*.¹ The doctrine, under various modifications, has been adopted into the law of Spain,² and that of France.³ It was not received into the law of Holland.⁴ Nor does it appear to have been recognised by the law of England. But in England there exists what is called the tenant right of renewal, applicable to leases for lives or terms of years, especially to those granted by the Crown, and by colleges and similar bodies.⁵

SECTION II.—DOCTRINE OF THE LAW OF SCOTLAND.

Art. 1.—
Possession
requisite.

The lessee must be in the natural possession, but (under the modifications to be immediately noticed) tacit location does not operate if the subject be sublet.⁶ This doctrine was established by a very ancient decision, purporting that tacit location is not presumed where the tenant is not in the natural possession.⁷

When tacit location has been constituted, it continues to operate although possession cease in consequence of subletting, if the principal lessee continue bound for the rent. The possession of the sublessee is deemed to be that of the lessee, with whom, although the conventional period of duration be expired, the contract subsists until he or the lessor shall, *habili modo*, intimate an

¹ Dig. lib. xix. tit. ii. l. 13, 14. Cod. lib. iv. tit. lxx. l. 16. Heinecc. ad Pand. para. iii. pa. 319, tit. 392. Voet ad Pand. lib. xix. tit. ii. sec. 10-12. Puffend. Droit du Gens, par Barbeyrac, *ut sup.*

² Inst. of the Civil Law of Spain, by del Rio and Rodriguez (transl. by Johnston), 225, and Note 5. De Molina, cited by Brunneman, ad l. x. 16, Cod. de Locationibus.

³ Pothier, Contrat de Louage, sixième

partie, Œuv. (oct. ed.) tom. i. pp. 181-98. Code Napoleon, vol. ii. p. 351, No. 1738.

⁴ Voet ad Pand. lib. xix. tit. ii. sec. 11. Inst. of Law of Holland, by Van Der Linden (transl. by Henry), 237.

⁵ Woodfall's Law of Landl. and Ten. 207-9.

⁶ Balfour 208; 2 Stair, ix. 23; 2 Ersk. vi. 36.

⁷ E. of Morton v. Scott, 1580, Mor. 15,314.

intention to dissolve it. A doctrine proving the existence of this principle, [508] because necessarily arising out of it, has been established by a modern decision. Where a subject possessed on tacit location has been sublet, it was held that the principal tenant must be warned to remove if he still continue bound for the rent.¹

As the warning must necessarily be given by the lessor, or by those empowered to remove tenants, so the renunciation, if made by the tenant, must be made to the landlord, or to those having power to receive a renunciation. In consequence, intimation by a lessee of his intention to leave his farm at the expiration of his lease having been made to a factor appointed by trustees, who at the time acquainted the tenant that he had no power to receive such intimation, it was held that the intimation ought to have been made to the trustees themselves, and that it was not sufficient to free the lessee from tacit relocation.²

Art. 2.—
Warning or
renuncia-
tion, by
whom, and
within what
time it must
be given.

On the same principle of equal dealing between lessor and lessee, it was decided that, in order to prevent tacit relocation, the same notice in respect of time must be given by the lessee as by the lessor. The period is forty days before the Whitsunday preceding the expiration of the lease.³

But there may exist circumstances in which warning of forty days before Whitsunday may be unnecessary, and notice of a few days be sufficient to bar the application of tacit relocation. Thus there had been let for one year ground intended to be disposed of in small lots for building. The tenant was allowed to continue in possession from year to year for several years, in the course of which he divided a great part of the ground into small portions, which he sublet to various persons, who occupied them chiefly as flower gardens. The proprietor feued out the ground thus occupied, and made an arrangement with the lessee, of which the substance was, that for possession for the year from Candlemas to Candlemas the lessee was to pay a diminished rent, and that if any part of the land should be feued between the terms, the lessee should give up possession on fourteen days' notice. Two days before Candlemas the proprietor reminded the lessee in writing that his lease expired at Candlemas. The lessee returned no answer to that intimation, but two days after Candlemas he wrote [509] to the proprietor offering an additional sum of rent for the year then commenced. The Court held that it was a transaction exclusive of tacit relocation,

¹ Thomson v. Harvey, 13 Dec. 1823, 2 D. and A. 128; aff. 1831, 9 S. Appen. F.C. 384, 2 S. 681.

² Mackintyre's Repre. v. Macnab's Trs., 11 Dec. 1829, F.C. 200, 8 S. 237,

No. 28, p. 7, 5 W. and S. 299.

³ Mackintyre's Repre., *ut sup.*

which arises from there being in the nature of the bargain ground to expect that it may be continued, but which ground did not there exist.¹

Art. 3.—
Effect of not
following
out warning
or renuncia-
tion.

1st, WITH THE LESSEE HIMSELF.—If the proprietor do not bring an action against the lessee for removing upon the warning, or if the lessee, notwithstanding his renunciation, continue to possess, the parties are legally deemed to have again altered their purpose, and the tacit relocation revives and subsists until a new warning or renunciation.² On this principle, it was decided that if three years expire after warning without removing, tacit relocation is not interrupted.³ So, a lessee of a liferenter or of a beneficed person after the granter's death not offering to remove, but continuing to possess, is liable for the rent.⁴ And a renunciation of a lease will not take off tacit relocation if the lessee thereafter continue to possess, if the lease be of lands or similar subjects, or if he continue to intromit, if the lease be of rents or feu-duties.⁵ It was decided that a summons upon a warning is sufficient to interrupt tacit relocation, notwithstanding that the party had passed from the removing *pro loco tempore*.⁶ And a pursuit for paying in time coming a greater rent than before was held to interrupt tacit relocation after the expiration of the lease.⁷

2d, WITH THE HEIR OF THE LESSEE.—The plea of tacit relocation is available to the heir of a lessee who dies within forty days before Whitsunday and has not been warned. Lands were possessed since a certain date by tacit relocation after a lease. The tenant died on the 19th of April. Not having been warned, he had thus a right to possess for another year. And it was held that there could be no doubt that the right descended to his heirs.⁸

Art. 4.—
Tacit relo-
cation
created by
receipt of
rent or by
similar
matter, and
vice versa.

Where the lessee pays forehand or anticipated rent, or herezeld or grassum, or continues to pay the stipulated rent annually, tacit [510] relocation is held to exist.⁹ In conformity, in an action of removing, the Court held a reason to be relevant, and therefore that tacit relocation was established, "founded upon the receipt

¹ Forsyth v. Bruce, 1827, 6 S. 101.

² 2 Ersk. vi. 35.

³ Bruce v. Bruce, 1610, Mor. 15,314.

⁴ Bishop of Argyle v. Commissary of Argyle, 1869, 1 B. S. 576.

⁵ Bishop of Argyle v. Walker, 1872, Mor. 15,318.

⁶ Carnousies v. Keith, 1616, Mor. 15,315.

⁷ Macbriar v. Rome, 1682, Mor. 15,320.

⁸ Hume v. Repra. of M'Leod, 1808, Hume 583.

⁹ Balfour 208, c. xlii.; 2 Craig, x. 11; 2 Stair, ix. 25; 2 Bankt. ix. 35. Arthur v. Tacksman of Holmaml, 1540, Balfour, *ut sup.* Bishop of Dunblane v. Drummond, 1562, Balfour, *ut sup.*

of the taxation since the date of the decret."¹ So, in an action of removing the Court admitted an exception of payment of rent since the warning to the oath of the disponee of the land, "but declared that, albeit the exception should be proved, it should not prejudice" the disponee "of his violent profits preceding the disposition."² But services performed subsequent to warning by direction of the baron officer, and taxation and feu-duties paid to the chamberlain, were held not to be sufficient to constitute tacit relocation. The services, it was decided, must be performed by the special direction of the proprietor, and the payments be made to himself.³ In modern practice the soundness of the decision may be questioned, as estates are generally managed by factors with full powers, and it may be deemed that it would be necessary to shew that the lessee knew that the powers of the factor were limited. In an analogous case, formerly noticed,⁴ there was evidence that the factor had acquainted the tenant that he had not power to receive the renunciation.

Tacit relocation, or consent to continue in possession, may be inferred from facts. It was decided that the receipt of feu-duties for terms, after the warning, for several years, by the wife or chamberlain of the proprietor, without an offer to return the same, put the tenants *in bona fide* to continue their possession, notwithstanding a warning, and freed them from paying more for those years; but it was held that those facts did not import a passing from the warning, unless the same had been done by the direct or implied warrant of the proprietor, and that the tenants might be decreed to remove at the next term without a new warning.⁵ So the proprietor of grain lofts, which were let for a year, sequestered the grain in security of the rent. Pending a lawsuit which ensued, the sequestration was recalled on condition of the tenant finding caution. The tenant not having found caution, and having allowed the grain to remain under sequestration in the premises until after the term, it was held that there was tacit relocation, and that he was bound as tenant for another year.⁶ And the tenant of a farm assigned his lease and continued to reside and manage the farm for the assignees. He granted a letter to the proprietor, binding [511] himself to remove at the expiration without warning or process of law. The landlord raised an action of removing against the cedent, in which he obtained a decree. The assignees sub-

Tacit relocation inferred from facts.

¹ A v B, 1616, Mor. 15,315.

² Ogilvy v. Mearns and Keith, 1618, Mor. 15,315.

³ L. Lochinvar v. —, 1633, Mor. 15,317.

⁴ Mackintyre's Repra. v. Macnab's Trs., *ut sup.*

⁵ E. Aboyne v. Vassala, 1679, Mor. 15319.

⁶ Robertson & Co. v. Drysdale, 21 Feb. 1834, 12 S. 477, 6 Jur. 284.

sequently intimated to the landlord that they did not consider themselves affected by any proceedings between him and the cedent, and that they meant to retain possession until legally warned to remove. In a process of suspension and interdict of a threatened removal, it was held that the assignees were not bound by the letter of the cedent, and were entitled to possess by tacit relocation.¹

The converse also holds good. 1st, Where it appears from the real evidence of the *res gestæ* that the continuance of possession is to be ascribed to a new express agreement, tacit relocation is excluded.² 2d, A house was let by verbal agreement for one year from Whitsunday, under the provision that either party meaning to bring the possession to a close should give six months' notice before Whitsunday. The tenant possessed under this bargain until Whitsunday, and tacit relocation then took place for another year, no warning having been given to him. In the beginning of March of the second year the house was sold. The seller, in order to make way for the buyer, instituted proceedings for the removal of the tenant, and subsequently the buyer sued at his own instance. These proceedings were taken more than forty days before Whitsunday. There was a difference of opinion on the Bench whether the obligation and *res gestæ* were obligatory as against the seller; but ultimately the Court found it unnecessary to decide that question, because they were of opinion, in the process at the instance of the buyer, that the tenant must be decerned to remove; for that the buyer was not affected by any verbal stipulation of an extraordinary privilege in point of warning beyond what the law requires.³

A tenant died about twelve months before the expiration of the lease. His eldest son did not enter into possession, nor, before the expiration of the term, did he intimate that he intended to take up the lease. Two younger sons had been in possession, with whom the landlord had dealt after the death of their father. An action of removing was raised against them, which it was held was well directed, as they were not entitled to plead that they derived their right from the heir, and as there was no emergence of tacit relocation between the landlord and the heir; for there never had been any dealings between them, the landlord neither knowing nor having heard of the heir, and not believing him to be his tenant.⁴

¹ Bett, &c. v. Murray, 14 Feb. 1845, 7 D. 447, 17 Jur. 221.

² Blain v. Ferguson and Hunter, 8 Feb. 1840, F.C. 575, 2 D. 546, 12 Jur. 331. The details of this case are given *infra*, book iv. chap. iii. sec. 1, art. 6, vol. ii.

³ Trotter and Clarke v. Lanceman, 1804, Hume 814.

⁴ S. and J. Wilson v. Stewart and E. of Mansfield, 2 Dec. 1853, 16 D. 106, 26 Jur. 61.

SECTION III.—KINDS OF LEASES AND SUBJECTS TO WHICH TACIT RELOCATION APPLIES.

[512] The contract of lease, whether written, verbal, or created by use of payment of rent, may, if voluntary, be renewed by tacit relocation.¹ It operates in leases granted by liferenters or wad-setters after the grantor's own right has been determined.² But it has been laid down that tacit relocation has no place in judicial leases on sequestrated estates granted by the Court of Session—*first*, because there is no deed of the Court interposed in such leases from which the consent of the Judges may be inferred, for warning is never used by the Court of Session. And *second*, because in judicial leases, where the lessee must give security to the creditors for the rents during the lease, the relocation cannot subsist on the same footing with the lease which was granted by the Court, for the lessee's cautioner is liberated after the expiration of the period stipulated in the judicial lease.³ Judicial leases, therefore, it has been said, are accountable for the rents which they have received after the expiration of the stipulated period, not as lessees, but as factors or stewards.⁴

Tacit relocation applies not merely to leases of lands, or houses, or other subjects of which the lessee is in the natural possession, but also to those of which he can have civil possession only. It takes place in a lease of feu-duties, as well as in a lease of lands.⁵ And in a lease of a barony, where the lessee is not in the natural but in the civil possession, by uplifting the rents from the tenants. But a new lease having been granted the second year, and intimated to the former lessee only in June, that second lessee was preferred for that second year's rent, and the first found liable, not for his tack duty only, but for the whole rents payable by the tenants.⁶

SECTION IV.—AGAINST WHOM TACIT RELOCATION OPERATES.

As tacit relocation was the renewal of a contract constituted by consent alone, it is the doctrine of the Roman Law that it

¹ 2 Stair, ix. 23; 2 Bankt. ix. 32; 2 Ersk. vi. 36; 2 Bell on Leases, 133.

² 2 Stair, ix. 23; 2 Ersk. vi. 36. E. Errol v. Parishioners of Ury, 1663, Mor. 15,218.

³ Ersk. *ut sup.*

⁴ Ersk. *ut sup.* Bethune, 1709, n.r. cited by Ersk. *ut sup.*

⁵ Bishop of Argyle v. Walker, *ut sup.* Crs. of Dunfermline v. Officers of State, 1806, Mor. 15, 390. E. Darnley v. Campbell, 1741, 1742, Mor. 15,322-4, Elch. Tack 5.

⁶ York-Buildings Co.'s Tackman v. Stewart, 1742, Elch. Tack 7.

terminates by the insanity of the landlord, and although not expressly set forth, the converse of the rule must have been good.¹ In France the rule is that if the landlord be insane and have no curator, there is no place for tacit relocation, but that there is if, upon the expiration of the lease, he have a curator. In this sense Pothier holds that the text of the Roman law must be interpreted,² and a similar construction is put upon it by Voet.³ According to Craig, this doctrine has not been adopted into the law of Scotland, for he says that by the usage of Scotland it is not held that the presumed will of the proprietor is altered by supervening insanity.⁴ In the other Institutional Books no *dictum* has been discovered. But in a modern treatise it has been said that by the law of Scotland tacit relocation is not affected by the supervening insanity of either the lessor or the lessee.⁵

In the absence of decisions and of authoritative *dicta* it is difficult to state with certainty what is the rule of the law of Scotland. There is much appearance of reason in the doctrine of the Roman law as interpreted by the Commentators and as adopted in France. As, by the law of Scotland, the contract of tacit relocation endures for an entire year, insanity supervening in the course of its duration would not terminate it, as there was valid consent when it originated, but if upon the expiration of the lease insanity exist, and there be no curator, it would be difficult to hold that the contract could be renewed by consent where there is no person capable of consenting. The technical absence of warning or renunciation would, seemingly, not be effectual to renew the contract, which depends for its renewal upon the evidence of consent implied from the want of either. The doctrine more conformable to the analogy of law appears to be that the contract could not be renewed.

In all other cases tacit relocation operates, as in leases by tutors or curators, or by a minor without curators or judicial factors. Although the lessor be deceased, yet the lessee may continue to possess after the expiration of the lease *per tacitam relocationem; quæ fictione juris, obtinet, in favorem bonæ fidei possidentis, etiamsi nullus sit qui relocare possit.*⁶ And it is valid against a donatary.⁷

¹ Dig. lib. ix. tit. ii. l. 14; Voet ad Pand. lib. ix. tit. ii. s. 2.

² Pothier, Contrât de Louage, sixième partie, Œuv. (oct. ed.) tom. i. p. 184; Code Napoleon, vol. ii. p. 224, art. 1108.

³ Voet, *ut sup.*

⁴ 2 Craig, ix. 11.

⁵ 2 Bell on Leases, 133.

⁶ Dir. and Steu. 342.

⁷ 2 Stair, ix. 23, and L. of Lee, 1627 there cited.

SECTION V.—IS POSSESSION BY TOLERANCE OR BY A VIRTUAL LEASE
RECOGNISED AS VALID?

In old cases attempts were made to plead a species of right resembling tacit relocation, founded upon possession by tolerance, and upon what has been termed a virtual lease. But these attempts were overruled. 1st, Where a removing from a house was pursued, a defence was rested upon an unexpired lease, under which a person possessed by the lessee's tolerance. The defence was pleaded by the lessee, to bar the removal of the occupier, that he had his tolerance, and that the lease secluded the lessor from removing any person "during the space thereof, or until it was lawfully taken away." But the defence was repelled.¹ 2d, In a similar action a defence was rested on a contract of wadset, which provided that the party might not redeem for a certain period, which was unexpired, and which provision was alleged to be of the nature of a lease, but the Court overruled the defence, holding that the wadset having been constituted by a contract, was, although embodying that provision, personal only, and not to be deemed to be a lease.²

¹ Lord Bergenie v. Stuart, 1621, Mor. 15,167.

² Hill v. Wright, 1628, Mor. 16,447.



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